

(22,135)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 909.

SOUTHERN PACIFIC COMPANY AND OREGON & CALIFORNIA RAILROAD COMPANY, APPELLANTS,

vs.

INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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No. 14760.

In the Circuit Court of the United States, Ninth Circuit, Northern
District of California. In Equity.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD
COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Bill of Complaint.

Wm. F. Herrin, P. F. Dunne, W. W. Cotton, F. C. Dillard, C. W.
Durbrow, Solicitors for Complainant.

Wm. F. Herrin, of Counsel.

Filed July 24, 1908.

SOUTHARD HOFFMAN, *Clerk.*

By J. A. SCHAERTZER,

Deputy Clerk.

3 In the Circuit Court of the United States, Ninth Circuit,
Northern District of California. In Equity.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD
COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United
States for the Northern District of California:

Southern Pacific Company, a corporation duly incorporated under
the laws of the State of Kentucky, and thereby a citizen
4 thereof, and Oregon & California Railroad Company, a cor-
poration duly incorporated under the laws of the State of
Oregon, and thereby a citizen thereof, bring this their bill of com-
plaint against the Interstate Commerce Commission, a body cor-
porate duly organized and existing under and by virtue of the Act
of Congress of February 4, 1887, entitled, "An Act to Regulate
Commerce," and the various Acts supplementary thereto, hereinafter
for the sake of convenience called "The Commission," and
thereupon your orators complain and say:

I.

At the time of the entering of the order by the Commission hereinafter referred to, at the time of the filing of the complaint bringing about said order, and continuously since long prior to that time your orators have been corporations organized as aforesaid, and by virtue of their charter powers engaged in the business of operating railways in the carriage of freight and passengers between States and Territories of the United States, and more particularly between the States of Oregon and California, under joint through arrangements and tariffs of rates, fares, and charges duly established, published, and filed with said Commission under said Acts of Congress to regulate commerce, to which Acts your orators are subject in the interstate carriage of freight and passengers. Each of your orators now has, and during all said time has had, its principal operating office in the Northern District of the State of California. The Honorable
5 Martin A. Knapp, who resides in the City of Washington,
District of Columbia, is the Chairman and presiding officer
of said Commission, and Edward A. Mosely, Esq., is Secretary
thereof.

II.

The matter and amount involved in this suit exceeds the sum or value of two thousand dollars (\$2,000.00), exclusive of interest and costs. The suit arises under the Constitution and Laws of the United States in that, as will hereinafter appear, your orators complain that certain provisions of the Act by virtue of which the Commission

fixed the rates hereinafter shown are in contravention of that Constitution, and in that your orators bring this suit under authorization of said Act to Regulate Commerce, as well as under the general equity jurisdiction of this Court.

III.

The main line of the Oregon & California Railroad extends from the California-Oregon State line through the Willamette Valley to Portland in the State of Oregon. It has sundry branch lines in said valley. The Southern Pacific Company has a line of railway extending northward from the City of San Francisco, in the State of California, connecting at the California-Oregon State line with the rails of the Oregon & California Railroad Company. On, and for a long time prior to April, 1907, your orator, Southern Pacific Company, operated as part of its system the Oregon & California Railroad, and was operating a continuous line of railway from

6 San Francisco to Portland, carrying over it freight and passengers from one State to the other under tariffs of rates, fares, and charges duly established, published, and filed with the said Commission. Prior to said April 18, 1907, your orators established a certain tariff or schedule of rates and charges known as Southern Pacific Local Tariff No. 47, I. C. C. No. 2874, which was duly published and filed with the said Commission, and which became effective on said 18th day of April, 1907. By this tariff the rate for carriage of lumber and forest products, which include rough green fir lumber and lath, between points in the Willamette Valley in the State of Oregon to various points in California, and among others to San Francisco and what are known as San Francisco Bay points, being points on the Bay of San Francisco which can be reached by carriers by vessel and likewise by your orator Southern Pacific Company, including Alameda, Oakland (Market Street), Oakland (Adams Wharf), Oakland Wharf, Oakland (Sixteenth Street), Stock Yards, West Berkeley, San Pablo, Hercules, Vallejo Junction, South Vallejo, Port Costa, Benicia, Martinez, Bay Point, Peyton, Cornwall and Antioch, was fixed at five dollars (\$5.00) per ton of two thousand (2,000) pounds in carload lots. Said rate having become effective on the date aforesaid, your orators were engaged in the carriage of lumber and forest products, including rough green fir lumber and lath, at said rate, when on or about the — of November, 1907, a certain complaint was filed before the said Commission by the Western Oregon Lumber Manufacturers'

7 Association and others against your orators, complaining that said rate, as applied to rough green fir lumber and lath, was unreasonable and praying a reduction of the same. On or about the 1st day of June, 1908, the said Commission delivered its certain opinion and made its certain order, which opinion and order are herewith filed and marked Exhibit "A," and prayed to be taken as part hereof as fully as if set out at length, by which it ordered and required your orators to cease and desist on or before the 15th day of August, 1908, from charging, demanding, collecting, or receiving for the transportation of rough green fir lumber and lath in car-

load lots their rate of five dollars (\$5.00) per ton of two thousand (2,000) pounds from points upon the east bank of the Willamette River in the State of Oregon and points on the west bank of said river south of Corvallis, Oregon, and points upon the west bank of said river north of said Corvallis, to San Francisco, California, and Bay points; and further ordered your orators to establish and put in force on or before the 15th day of August, 1908, and maintain in force thereafter for a period of not less than two years, and apply to the transportation of rough green fir lumber and lath in carload lots, a rate not exceeding three dollars and forty cents (\$3.40) per ton of two thousand (2,000) pounds from points on the east bank of said Willamette River and points upon the west bank thereof south of said Corvallis to San Francisco, California, and Bay points, and a rate of not exceeding three dollars and sixty-five cents (\$3.65) per ton of two thousand (2,000) pounds from points upon
 8 the west bank of said river north of said Corvallis to San Francisco, California, and Bay points, not including in either rate the City of Portland, Oregon, as a point of origin; and further ordered and required your orators to publish and make effective said rates. Said order is in words and figures as follows, to-wit:

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 1st day of June, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1331.

WESTERN OREGON LUMBER MANUFACTURERS' ASSOCIATION, WILLAMETTE VALLEY LUMBER COMPANY, FALLS CITY LUMBER COMPANY, CURTISS LUMBER COMPANY, CHARLES K. SPAULDING LOGGING COMPANY, BOOTH-KELLY LUMBER COMPANY, J. H. CHAMBERS, H. M. PARVIN, and CRUSAN BROTHERS, Complainants, and
 9 INMAN-POULSON LUMBER COMPANY, OREGON & WASHINGTON LUMBER COMPANY, EAST SIDE MILL & LUMBER COMPANY, STANDARD BOX & LUMBER COMPANY, JONES LUMBER COMPANY, and ST. JOHN LUMBER COMPANY, Interveners,

vs.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendants, the Southern Pacific Company and the Oregon & California Railroad Company be and they are

hereby, notified and required to cease and desist, on or before the 15th day of August, 1908, from charging, demanding, collecting, or receiving for the transportation of rough, green fir lumber and lath, in earloads, their present rate of \$5 per ton from points upon the east bank of the Willamette River, in the State of Oregon, and upon the west bank thereof south of Corvallis, Oreg., and upon the west bank of said river north of said Corvallis, to San Francisco, Cal., and bay points.

It is further ordered, That said defendants be, and they are hereby, notified and required to establish and put in force, on or before the said 15th day of August, 1908, and maintain in force thereafter during a period of not less than two years, and apply to the transportation of rough, green fir lumber and lath, in earloads, a rate not exceeding \$3.40 per ton from points upon the east bank of said Willamette River and upon the west bank thereof south of said Corvallis, to San Francisco, Cal., and bay points; and a rate not exceeding \$3.65 per ton from points upon the west bank of said river north of said Corvallis, to said San Francisco and bay points, not including in either rate Portland, Oreg., as a point of origin.

And it is further ordered, That said defendants be, and they are hereby, authorized to make effective upon three days' notice to the public and the Interstate Commerce Commission, given in the manner required by law, such rates as it may be necessary for said defendants, or either of them, to establish for the purpose of complying with this order. The schedules containing such rates must bear the notation that said rates are issued under the authority hereby granted, and must refer to the title and number of this case.

Said order was duly served on each of your orators by mailing a copy thereof to the president of your orators at his usual place of business, and unless the same is suspended by order of court will become effective on said 15th day of August, 1908.

IV.

Upon information and belief your orators aver and charge that in making said order and endeavoring to establish said rates, said Commission acted without warrant of law and outside of any powers rightfully held by them; that the said Act of 1887 to regulate commerce and the several Acts amendatory thereof and supplementary thereto, particularly the amendment of June 29, 1906, popularly known as the "Hepburn Bill", under which said Commission professed to act, in so far as they attempt to confer upon the Commission the power to make rates are in violation of the Constitution of the United States in that they profess to confer upon said Commission executive, legislative, and judicial powers. More specifically pleading in this behalf your orators say: All through said Acts administrative powers are conferred upon the Commission. In section fifteen (15) the Commission is authorized to act as a court, to take judicial cognizance of complaints filed for damages and after hearing to award damages, which award establishes a *prima facie* right in the complainant and is to have an effect in courts similar to the findings of a master-in-chancery, and

which no carrier against whom the award has been made can resist except by assuming the burden of proof and overflowing the *prima facie* effect of the Commission's award. The award can be resisted only under penalty of the carriers paying not only the usual costs of suit but an attorney's fee to complainant in addition if cast in the action. In said section fifteen (15) legislative powers are conferred upon the said Commission in that said Commission is authorized to determine what regulations or practices of the carrier affecting rates are unjust or unreasonable, or unduly discriminatory, or unduly prejudicial or preferential, or otherwise in violation of the provisions of the Act and to determine and prescribe what shall be a just and reasonable rate, or rates, charge, or charges, to be thereafter observed as a maximum, and what regulations and practices in respect to such transportation are just and reasonable to be thereafter followed; and to make orders under which the carrier shall abide by rules and regulations made by the Commission. All of which your orators

12 charge upon information and belief is contrary to the Constitution of the United States and especially to section one (1), article one (1) which provides that "all legislative powers herein granted shall be vested in the Congress of the United States;" and section one (1), article three (3) providing that "the judicial power shall be vested in one supreme court and such inferior courts" as the Congress may from time to time establish.

V.

More specifically pleading as to that provision of section fifteen (15) of the Act to Regulate Commerce as amended which declares that the Commission shall prescribe what shall be the reasonable rate or rates, charge or charges, to be observed as the maximum to be charged, upon information and belief your orators say, this provision is contrary to the Constitution of the United States and especially to section one (1), article one (1), above quoted, in that by that article all legislative power is confined to the Congress of the United States. The prescribing of a maximum rate which carriers may charge is a legislative function. Congress has not prescribed a maximum rate to govern in the cases provided for, but by said Act delegates this power to the Commission, and in so doing places in its hands legislative power.

VI.

Making specific reference to the opinion of the Commission herewith filed your orators aver and charge that the Commission
 13 did not, and it affirmatively appears from said opinion that they did not find the rate of five dollars (\$5.00) per ton to be unreasonable, but your orators aver found such rate to be reasonable in and of itself. Your orators say it further appears from the said opinion and the truth is, the Commission not only failed to find the rate of three dollars and ten cents (\$3.10) or the rates established by them to be reasonable, but on the contrary specifically found the rate of three dollars and ten cents (\$3.10) to be a low rate, and found the rates established by them to be, as in truth they are, substantially

the same as the rate of three dollars and ten cents (\$3.10.) and thus also low rates. Yet because of matters extraneous to the question of the reasonableness of the rate, the Commission ordered your orators to desist from charging the rate of five dollars (\$5) per ton, and ordered them to charge rates not exceeding the amounts fixed by them as above shown, thus fixing as maxima, rates not found by them to be reasonable, but on the contrary found to be low.

VII.

Your orators aver the Willamette Valley lies in the State of Oregon commencing at the Columbia River and extending southward a distance of about 150 miles, with the Willamette River flowing through it. Near the mouth of the Willamette River is situated the City of Portland on the waters of that river. The Willamette River flows into the Columbia River, which in turn flows into the Pacific Ocean,

and these rivers are navigable for ocean-going vessels from 14 Portland to the ocean. Between Portland and the ocean, on the Columbia River, is Gray's Harbor. The cities of Seattle and Tacoma in the State of Washington are situated on an inlet from the Pacific Ocean navigable for ocean-going vessels. About the cities of Portland, Tacoma, and Seattle, about Gray's Harbor and other places having communication by vessel with San Francisco and bay points, are extensive lumber producing forests, and at these places in the year 1898 there were mills for the manufacture of lumber, and continuously since then the manufacture of lumber has been extensively carried on there. Between these places and the City of San Francisco and other San Francisco Bay points vessels ply carrying lumber. In the year 1898 in the Willamette Valley south of Portland there were only two or three mills for the manufacture of lumber. For such lumber as was manufactured or might be manufactured in the Willamette Valley south of Portland there then was no through rate through Portland to the territory lying east of Portland, and no rate which would permit of lumber being thus marketed. About that year certain persons desired to undertake the manufacture of lumber on a considerable scale in the Willamette Valley south of Portland and established mills at Saginaw and Coburg in that valley. They sought of the Southern Pacific Company the establishment of a low rate from these points to San Francisco, one low enough to meet water competition from the points above named from which lumber could move by ocean-going vessels to San Francisco and Bay points. In January, 1899, your orators

15 duly made such rate on lumber from Saginaw and Coburg, and from Albany, Portland and East Portland, to San Francisco, and some other Bay points, the same being three dollars and ten cents (\$3.10) per ton of two thousand (2,000) pounds. This rate was low, and recognized so to be by your orators and by all persons shipping under it, but at the time was deemed necessary to meet the water competition above shown. There was no contract or agreement that your orators would establish a rate of any specific amount, or that they would maintain any rate which they might establish for any given time, nor was there any contract by which

your orators agreed to put in any rate. It is true your orators wished to foster, protect, and increase the manufacture of lumber in the Willamette Valley south of Portland, and established the rate aforesaid to bring about this result, but under no contract or promise of maintenance of the same, as aforesaid. Subsequent to the date above named the rate of three dollars and ten cents (\$3.10) to San Francisco Bay points was withdrawn at Portland and a rate of five dollars (\$5) was established there, but the rate of three dollars and ten cents (\$3.10) was extended to practically all points manufacturing lumber in the Willamette Valley, other than Portland, except that from points west of the river at certain places, and on the Wendling Branch, the rate was twenty-five cents (\$0.25) per ton more. At the time of the existence of this rate to San Francisco Bay points your orators also had in existence a scale of rates to what is known as San

Francisco Bay District, which included points nearby the Bay
 16 points, and to which the rate was made by adding to the three dollars and ten cents (\$3.10) to San Francisco Bay points was withdrawn *ing* points to the places of delivery until the maximum of five dollars (\$5) was reached. Outside of the Bay points and Bay District points the rate from Willamette Valley points to other points in California beyond the Bay District exceeded the sum of five dollars (\$5). Since 1898 many mills have been built in the Willamette Valley until there are now in that valley south of Portland about two hundred and fifty (250) mills. About January, 1904, your orators replaced the rate to San Francisco Bay points and to Bay District points by a rate of five dollars (\$5) per ton of two thousand (2,000) pounds; that is to say, the rate of five dollars (\$5) from Willamette Valley points took the place of the rate of three dollars and ten cents (\$3.10) to Bay points, and of the rate of three dollars and ten cents (\$3.10) plus the local rate to Bay District points. At the earnest solicitation of certain lumber manufacturers, your orators about May, 1904, restored the rate of three dollars and ten cents (\$3.10) as applied to rough green fir lumber and lath to San Francisco and Bay points and the \$3.10 scale to San Francisco Bay District points. But there was no contract to do so; and there was no contract or agreement that this rate should be maintained for any given length of time. April 18th, 1907, your orators, by their tariff above shown, withdrew the three dollars and ten cents (\$3.10) rate and scale as applied to rough green fir lumber and lath, and applied to it the rate of five dollars (\$5) as is above pleaded.

17 At the time the rate of three dollars and ten cents (\$3.10) was established, there was as aforesaid no movement of lumber from the Willamette Valley via Portland to the East, but lumber from that valley moved southward over the lines of your orators, and such as moved East went over the lines of the Southern Pacific Company and connections to Utah, Colorado, Nevada, Arizona, and other States and Territories. During all this time lumber from Portland and other points in Oregon, and Washington, lying upon the waters navigable for ocean vessels, moved to San Francisco and Bay points. In the year 1901 Portland was opened as a gateway to the East for lumber from the Willamette Valley, and the same rate

was applied through Portland to all points east of Pocatello, Idaho, that applied to lumber originating at Portland or other points in Oregon or Washington west of the Cascade Mountains. To points west of Pocatello was applied the rate from Portland, plus the local rate from point of origin to Portland. The route from the Willamette Valley to the south passes over the Siskiyou Mountains and over a way where the grades are severe, reaching as much as 3.3%; where only small trains can be handled and the expense of operation is great. This largely induced the opening of the Portland gateway and the fixing of the rate to the East for lumber originating in the Willamette Valley. This way has much less difficult grades and is less expensive to operate. By the year 1907 about seven-twelfths (7/12) of the lumber from the Willamette Valley moved to the East via Portland, and only about five-twelfths (5/12) to the South. At that time less than twenty per cent. (20%) moved into the territory affected by the rate of three dollars and ten cents (\$3.10).

VIII.

Your orators aver that the facts set forth in the preceding paragraph (No. VII) appeared on the hearing before the Commission without dispute, and were found by the Commission to be true, as appears from their opinion herewith filed. As is above pleaded, the Commission did not adjudge the rate established by your orators under their tariff effective April 18, 1907, to San Francisco and Bay points to be unreasonable in itself as applied to the carriage of rough green fir lumber and lath, or greater than is warranted by the cost and value of the service rendered, but did, as aforesaid, find the rate of three dollars and ten cents (\$3.10) to be a low rate. The Commission raised the rates from three dollars and ten cents (\$3.10) and three dollars and thirty-five cents (\$3.35) to three dollars and forty cents (\$3.40) and three dollars and sixty-five (\$3.65), respectively, but made this slight raise only because there had been some increase in charter rates, and held, as indeed the truth is, that the rates are substantially the same as the former rates. They held that the rates in existence prior to April 18, 1907, had been established by your orators under the circumstances shown in paragraph VII above; that on the faith of these rates the lumber industry had been developed in the Willamette Valley, and that your orators were therefore estopped from making an advance in the rates as made by them, but that your orators must for the indefinite future continue the rates at substantially what they were when originally installed.

Your orators aver that the Commission exceeded in this holding any power granted them by law; that in so holding the Commission attempted not to determine the reasonableness of the rate as was their only power under the Act to regulate commerce, but to adjudicate a question of estoppel between shippers and the railways arising out of the conduct of the latter, and to establish for the future a rate less than a reasonable rate as the result of such adjudication, and attempted to require your orators to establish from points in the

Willamette Valley to San Francisco Bay points unreasonably low rates for the purpose of meeting rates made by water carriers engaged in transporting lumber from ports on the Columbia River, Gray's Harbor and on Puget Sound to such San Francisco Bay points.

IX.

Your orators aver that the rate of \$3.10 was and is an unreasonably low rate, and was and is one of the lowest rates on lumber in the United States, and that the rate of \$5.00 was and is in and of itself a reasonable rate for the transportation of lumber from points in the Willamette Valley to San Francisco, California, and Bay points.

Your orators aver that upon the hearing of the complaint
20 before the Commission it was conceded by complainants that the rate of three dollars and ten cents (\$3.10) was a low rate, one of the lowest rates on lumber in the United States. It was also conceded that the rate of five dollars (\$5.00) was in and of itself a reasonable rate, and that demand would not have been made for its reduction if the lower rate had not been originally established. The evidence introduced on the trial of the cause before the Commission showed that the former rate of three dollars and ten cents (\$3.10) was an exceedingly low rate; that the rate of five dollars (\$5.00) is in and of itself a reasonable rate for the service performed, and nothing appeared to the contrary. Wherefore, your orators charge that upon the undisputed facts it was the duty of the Commission not to reduce the rate of five dollars (\$5.00), and especially that they had no power to reduce the rate to the amounts at which they fixed them as maximum to be charged, when such amounts were conceded and shown to be unreasonably low.

Your orators will produce on the hearing hereof a full transcript of the evidence introduced on the hearing before the Commission and of the statements of counsel, and pray your Honors that the same be considered in connection with and in support of this bill.

X.

Your orators aver that in establishing, and, after it was once withdrawn, in restoring, the recognized low rate of three dollars and ten cents (\$3.10) for the purpose of building up the lumber industry in Willamette Valley they did not directly or indirectly
21 promise or agree that they would maintain it for any time. They in no way abandoned their discretion to increase the rate when their judgment indicated it should be increased; nor was there any promise that the rate for the future should be governed by the water rates or made with regard to them, but the doing of this was retained within the discretion of your orators.

Your orators deny that any mills were built in the expectation that the rates established, or practically the same rates, would be maintained, or in expectation that your orators would abandon their right to increase the rates as the exigencies of traffic might demand and the judgment of your orators should dictate. They deny that any one had the right to harbor any such expectation.

Your orators say that in the last several years the lumber business has greatly increased, forests of white pine have been depleted, the demand upon the yellow pine forests has been large. The result has been a great demand for lumber from the forests of the Pacific Coast, with a consequent handsome profit in the manufacture of it. Your orators aver it is because of these conditions, and because lumber manufacturers expected to reap much profit, that the lumber industry has so grown on the Pacific Coast, including the Willamette Valley.

As above appears, at the time the rate of three dollars and ten cents (\$3.10) was established the only market for lumber from Willamette Valley was to the South. Since the opening of
22 the Portland gateway, as was stated by witnesses for complainant on the hearing before the Commission, and as is true, the market thus opened up to Willamette Valley mills is their most desirable and profitable market.

At the time the rate of three dollars and ten cents (\$3.10) was established, lumber in the Willamette Valley was of comparatively little value. Since said time it has greatly increased in price and value until at the time of the establishment of the rate of five dollars (\$5), in 1907, it was worth about double what it was worth at the time of the establishment of the rate of three dollars and ten cents (\$3.10).

At the time of the establishment of the rate of three dollars and ten cents (\$3.10), the low price of lumber and restricted demand for it, and the fact that the mills of the Willamette Valley could profitably seek markets only through the lines of your orators and south of Portland, the establishment of a low rate was esteemed a wise thing to do by your orators. Owing to changed conditions the continuance of that rate, or one approximately as low, is not necessary to the prosperity of the lumber industry, and would be to force your orators to carry lumber at an unreasonable and unremunerative rate.

Your orators say that when the rate of \$3.10 was first established, probably the very great bulk of the lumber from the Willamette Valley went to San Francisco and Bay points, but that at the time of the establishment of the rate of five dollars (\$5), as above appears, about seven-twelfths ($7/12$) of the lumber from Willamette
23 Valley sought the markets of the East through the Portland gateway, and less than twenty per cent. (20%) went to San Francisco and Bay points. The true amount was something over fifteen per cent. (15%).

Your orators aver that no right exists in the Commission and duty rests upon carriers to make rates so low that shippers may find a market, and they further aver that no duty rests upon them of making or continuing a rate at so low a figure that products carried by them shall find a market in the same place where they come into competition with products carried by water, but that the option is left with the carrier to meet water competition. They aver, however, upon information and belief, that shippers of rough green fir lumber and lath from the Willamette Valley can still reach the markets of San Francisco and Bay points at a profit. Your orators say, how-

ever, that even if this is not true, it is a fact that in the manufacture of lumber it is the average profit which is considered by the lumbermen. In such manufacture, some lumber is sold at large profit beyond the cost of manufacture, some at much less profit, some at no profit, and some of the lower grades are sold at less than the cost of manufacture. Your orators aver that the shippers of the Willamette Valley have no right to demand or expect of your orators that they shall make a rate of carriage so low upon their common grades of lumber that these grades can reach a market at an average distance of more than six hundred (600) miles from the point of production, and there be sold at a profit in competition with lumber moving to those points by water.

24

XI.

Your orators say that since the establishment of the rate of three dollars and ten cents (\$3.10) the cost of operation of all railways, including those of your orators, has vastly increased; that labor and material have so increased in price that rates then reasonable are not so now.

Your orators say that in handling this traffic they have to transport it over a line, 250 miles of which can be operated only at great expense. The gradients and curvatures are such that only light trains can be hauled, and many engines have to be used. This line of railway passes over the Siskiyou Mountains, which rise abruptly to a height of 4124 feet. In a distance of fifteen (15) miles the road rises over a peak 2388 feet. At this point the most powerful engine of your orators, being an engine of four (4) drivers, and weighing 171.5 tons, can only handle 345 gross tons. For a distance of 47 miles an engine of that type can only handle 560 gross tons; for a distance of 49 miles only 700 gross tons; and for a distance of 107 miles only 500 gross tons; and for 36 miles only 345 gross tons. Over 203 miles of your orators' line helper engines have to be used. At some places it takes one helper engine, or two engines, to handle light trains, and for a distance of 36 miles it takes three engines to handle the trains. All of which entail a very heavy expense of operation. Your orators' line is so situated that it is subject to

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frequent washouts, making the track difficult to keep in condition for operation and causing heavy expense for repair.

The lumber moving from Willamette Valley is gathered largely from branch lines maintained almost solely for lumber and operated at heavy expense. Freight moves in much greater quantities from the Willamette Valley to the South than from the South into the valley. This brings about a large movement of empty cars to the North for the hauling southward of lumber from the valley.

Your orators aver that for some time before it was changed, the rate of three dollars and ten cents (\$3.10) was not a remunerative rate. They aver and charge that the rates established by the Commission will prove unremunerative.

Your orators say that by reason of the conformation of the Willamette Valley, and by reason of water competition made by the Willamette and Columbia Rivers and the ocean, traffic conditions

in the valley are unusual and demand the judgment and discretion of experienced traffic men constantly in touch with those conditions. From their experience with those conditions, and satisfied that the rate of five dollars (\$5) is just and reasonable to shippers, they established the same. They aver that said rate is reasonable and say that the establishment of any rate less than this would be unreasonable.

Upon the hearing hereof your orators will produce sundry affidavits which they pray may be considered in connection with and in support of this bill.

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XII.

Your orators say if the rates established by the Commission are permitted to go into effect and shall ultimately be held to be unreasonable, your orators will suffer irreparable injury; that judging from the past, your orators believe the movement of cars per year from Willamette Valley mills to San Francisco and Bay points will be about one thousand (1,000); that the average loading of said cars is about twenty-nine (29) tons; of said cars eight hundred (800) would move under the three dollars and forty cents (\$3.40) rate, and two hundred (200) under the rate of three dollars and sixty-five cents (\$3.65), so that if the rates established by the Commission are permitted to go into effect, but ultimately held to be bad, your orators will lose the amount above indicated; that until the establishment of a new rate your orators will be forced to carry lumber at said unreasonable rate, thus suffering irreparable injury in the reduction of their just revenues.

Your orators say that since the 18th day of April, 1907, they have been carrying lumber to San Francisco and Bay points at the rate of five dollars (\$5) per ton. If the rates established by the Commission are permitted to go into effect there will be a multiplicity of claims for reparation and suits against your orators, against which they would have no adequate protection. Your orators say they are without any adequate remedy, except as your Honors may grant to them a writ of injunction as herein prayed for.

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XIII.

To the end that your orators may obtain the relief to which they are entitled in the premises they now pray:

First. That upon the filing of this bill your Honors will grant all such temporary and interlocutory restraining orders suspending the enforcement of the order of the Commission as may be necessary pending the further hearing of the matters of this bill.

Second. That this bill be set down for further hearing on a day certain to be named by your Honors and that said Commission be given notice thereof and called upon to show cause why there should not be granted a preliminary injunction suspending their said order, and enjoining them, their officers, agents, servants, and representatives from enforcing the same, or instituting any suits or taking any proceedings to enforce the same until final determination of this

case; and that upon such day so fixed by your Honors, or as speedily thereafter as practicable, your Honors grant a preliminary injunction so suspending such order and so enjoining said Commission, its officers, agents, servants, and representatives.

Third. That upon final hearing said preliminary writ of injunction be made perpetual and that it be decreed that said order of said Commission shall be forever set aside, annulled, and held for naught, and that said Commission, its officers, agents, servants, and representatives, be forever enjoined from enforcing or taking any steps to enforce the same.

28 Fourth. That there be granted to your orators process of subpoena to said defendant, The Interstate Commerce Commission, requiring them to duly appear and answer (but not under oath, the same being expressly waived) the several allegations of this bill.

Fifth. Your orators further pray for such other general and special relief as in equity and good conscience is meet and proper.

SOUTHERN PACIFIC COMPANY,
OREGON & CALIFORNIA RAILROAD
COMPANY,

By C. H. REDINGTON, *Assistant Treasurer*,
WM. F. HERRIN,
P. F. DUNNE,
W. W. COTTON,
F. C. DILLARD,
C. W. DURBROW,

Solicitors for Complainant.

WM. F. HERRIN,
Of Counsel.

29 COUNTY OF SAN FRANCISCO,
State of California, ss:

I, C. H. Redington, being duly sworn, say that I am Assistant Treasurer of the Southern Pacific Company and of the Oregon & California Railroad Company, and that I sign the corporate name of complainants to the foregoing bill and attach the corporate seal. I further say that I have read the foregoing bill of complaint and that the allegations therein contained are true, except where made upon information and belief, and where so made I believe them to be true.

[SEAL.]

C. H. REDINGTON.

Sworn and subscribed to before me, E. B. Ryan, a notary public in and for the County of San Francisco, in the State of California, this 24th day of July, 1908.

[NOTARY'S SEAL.]

E. B. RYAN,
*Notary Public in and for the City and County of
San Francisco, State of California.*

30 Before the Interstate Commerce Commission.

No. 1331.

WESTERN OREGON LUMBER MANUFACTURERS' ASSOCIATION ET AL.
v.
SOUTHERN PACIFIC COMPANY ET AL.

Submitted March 6, 1908. Decided June 1, 1908.

Teal & Minor for complainants.

W. H. Abel for interveners.

W. F. Herrin, P. F. Dunne, W. W. Cotton, and F. C. Dillard for defendants.

Report and Order of the Commission.

31 No. 1331.

WESTERN OREGON LUMBER MANUFACTURERS' ASSOCIATION ET AL.
v.
SOUTHERN PACIFIC COMPANY ET AL.

Submitted March 6, 1908, Decided June 1, 1908.

1. Where a rate has been established and maintained for a considerable period for the purpose of developing a particular industry and with full knowledge that the industry could not be developed without it, and where, under the influence of such rate, large amounts of money have been invested in property the value of which must be seriously impaired by an advance of the rate, that fact is an important consideration in passing upon the reasonableness of such advance.
2. The Southern Pacific Company established a rate of \$3.10 per ton upon rough green fir lumber and lath from points in the Willamette Valley to San Francisco for the purpose of developing the lumber industry in that section, and maintained the rate in effect, with a brief interval, for six years; and on the strength of this rate that industry attained considerable proportions. In April, 1907, this rate was advanced to \$5 per ton; *Held*, That the advance was unreasonable and that the rate ought not for the future to exceed \$3.40 per ton.

Teal & Minor for complainants.

W. H. Abel for interveners.

W. F. Herrin, P. F. Dunne, W. W. Cotton, and F. C. Dillard for defendants.

Report of the Commission.

PROUTY, Commissioner:

On April 18, 1907, the Southern Pacific Company advanced the rate on rough green fir lumber and lath from certain points in the Willamette Valley to San Francisco, from \$3.10 to \$5 per ton, and

the lawfulness of that advance is before us in this proceeding. The rate of \$3.10 applied from all mills upon the east bank of the Willamette River and from mills south of Corvallis, upon the west bank of that river. From mills north of Corvallis, upon the west bank, an additional charge of 25 cents per ton was imposed. The rate did not apply from Portland itself.

The new rate of \$5 per ton, established April 18, applies to all mills in the Willamette Valley upon both sides of the river, including Portland. The complainants ask to have the \$3.10 rate
32 restored at those points to which it formerly applied, on the east of the river, and also that it be extended to mills upon the west of the river. Certain lumber manufacturers whose mills are located at Portland have intervened with the prayer that the \$3.10 rate be accorded to mills at Portland. Three questions are therefore presented by the record.

First. Shall the \$3.10 rate be restored to those points to which it formerly applied?

Second. Shall it be extended to mills upon the west bank of the Willamette River?

Third. Shall mills at Portland be given the benefit of this rate?

To an understanding of the questions presented a **brief reference** to the development of the lumber industry in the Willamette Valley seems necessary.

Previous to 1898 no lumber was cut in that valley except such as was necessary to supply the local consumption. The ocean could only be reached at Portland upon the north after a rail haul of considerable length and upon a comparatively high rate, so that lumber cut in the Willamette Valley could not find a market by water in competition with that produced in Portland. The rate to the south was so high as to prohibit shipments in that direction in competition with water carriage from Portland. About 1898 the Southern Pacific Company became convinced that it ought to adopt a policy which would develop the lumber industry along its lines in the Willamette Valley. At that time it had no affiliation with the Union Pacific Railroad or its allied lines and therefore could obtain no outlet for this lumber through the Portland gateway. Since both the Oregon Railroad & Navigation Company and the Northern Pacific Company had extensive lumber interests of their own which they were bound to protect, the only possible market was to the south and to points in the east reached via the south.

For several years rates had been in effect from Puget Sound territory and from Portland to Utah, Colorado, and other eastern destinations. In order that lumber produced in the Willamette Valley might be given a market in competition with Washington and Portland mills in this territory it must go south to Sacramento and east over the lines of the Southern Pacific. There was also an extensive market in San Francisco and adjacent territory. This market could be reached from Portland and from points upon Puget Sound by water, and lumber arriving at San Francisco by water could there be loaded upon the cars and shipped by rail both to nearby interior points and to the eastern points above mentioned. In order, therefore, to give

this lumber of the Willamette Valley a market it was absolutely essential to establish a rate from that territory to San Francisco which was fairly equivalent to the water rate from Portland and from corresponding points. This was perfectly understood by all parties and the determination of the Southern Pacific was to do precisely this thing.

What actually occurred in that valley can be best shown by considering the history of the operations of the Booth-Kelly Company, which was the first operator in the field and which is to-day the largest producer of lumber in that region. In 1897 Mr. Booth was running a mill in the southern part of Oregon for the cutting of pine, which is used mainly for sash and doors and cabinet purposes. An opportunity presented itself to lease a mill which had just been constructed for the manufacture of fir, and the Southern Pacific Company applied to him stating that a determination had been reached to make this lower rate and asking him to lease this mill. At that time the merchantability of Oregon fir in competition with Puget Sound fir and other lumber had not been demonstrated, but Mr. Booth, believing that the experiment was worth trying, leased this mill for a year and the railroad company put in a rate of \$3.10 per ton.

An actual test showed Mr. Booth that this lumber would sell in competition with other fir in the San Francisco market and also convinced him that he could profitably manufacture upon the rate proposed. He therefore entered into negotiations with the Southern Pacific Company for the purchase of a tract of timber land embracing about 17,000 acres. In order to reach this land it was necessary to construct a railroad some 20 miles in length, which the Southern Pacific undertook to do upon condition that Mr. Booth should ship over the road for the first year a certain number of carloads of lumber, that he should pay an arbitrary rate of so much per ton over this branch road, and that he should take off the lumber from the tract in question within a given time.

Mr. Booth testified—and there can be no doubt of the fact—that previous to the making of this contract and as the basis of all his operations it was understood between him and the railroad company that a rate to San Francisco should be put in and maintained which was fairly equivalent to the water rate from Portland and that he should also be given a rate via Sacramento to various eastern points in Idaho, Utah, and Colorado. In accordance with this understanding the Southern Pacific established in 1899 a rate of \$3.10 per ton upon lumber to San Francisco and bay points. This original rate applied to all kinds of lumber both green and dry. At first it was only applicable to the section in which the Booth mills were located, but was very soon extended to the entire Willamette Valley, including Portland.

Under the stimulus of this rate the lumber business in the Willamette Valley rapidly developed. The Booth-Kelly Company extended its own operations, and many other mills sprang up, until, in 1904, that industry had reached very considerable proportions.

In the latter part of 1903 the \$3.10 rate was withdrawn from Portland, and in January, 1904, it was withdrawn from the entire Willamette Valley, a rate of \$5 being established instead. The testimony in this case shows that the effect of the putting in of the \$5 rate was, or would have been if continued, to practically suspend the operations of these mills. They made this representation with great earnestness to the Southern Pacific Company, and finally the leading officials of that company, among others its chief traffic director, visited the scene of these operations. As a result of this personal inspection and after further consideration that company announced that while the rate never ought to have been made at the outset, inasmuch as it had been, that company would continue it for the future, but would limit it to rough lumber shipped green. Acting upon this announcement, the Southern Pacific Company did, in May, 1904, make effective once again this rate of \$3.10, which was now, however, applied not to all lumber, but only to rough green fir lumber and lath.

As showing the importance which lumber manufacturers in this region attached to the \$3.10 rate, what occurred at the time this rate was withdrawn in 1904 in a particular instance may be mentioned. A certain operator who owned one mill already had arranged, in the year 1903, to purchase a considerable quantity of timber and to erect a large mill. When rumors of the withdrawal of the \$3.10 rate became rife he suspended his negotiations, but after the rate was reestablished in 1904, believing from what the officials of the Southern Pacific had said to him that this company had now finally determined upon the maintenance of this rate as a permanent policy, he purchased his land and resumed the building of his mill, and has since constructed still another mill and purchased some 800,000,000 feet of timber.

There can be no question but what the existence of this industry in anything like its present proportions in the Willamette Valley is almost entirely due to the establishment of this \$3.10 rate. Without it the mills would not have been built nor the timber which these operators own purchased, nor could the business have been profitably conducted during recent years upon the present rate of \$5 per ton. The complainants insist that a maintenance of the present rate will shut up their mills and very largely depreciate their timber investments.

There are some 250 mills in the Willamette Valley, not including Portland, with a capacity of perhaps 1,300,000,000 feet per annum, although the actual cut of these mills has never exceeded in any one year 1,000,000,000 feet, of which about two thirds is shipped
35 out by rail over the lines of the defendants, the balance being consumed locally. A considerable part of this so-called local consumption is purchased by the railroad itself for its own use. The Booth-Kelly Company manufactures nearly one-seventh of the entire output of the valley and there are two or three other large operators, but the great majority of these mills are small with a capacity of from 10,000 to 20,000 feet in ten hours.

Green fir lumber weighs about 3,300 pounds to the 1,000 feet, and therefore an advance of \$1.90 per ton would be equivalent to

\$3.13½ per 1,000 feet. The profit in manufacturing lumber in the Willamette Valley during the last seven or eight years has probably ranged from \$1.50 to \$2.50 per 1,000. These profits have often been greater and often less, but the above are perhaps the fair average limits. Most operators in this section own their own timber, but stumpage is frequently bought, and has ranged from 25 cents to \$1 per 1,000. In arriving at the above profit stumpage is always charged as a cost of production. The Booth-Kelly Company charges itself for stumpage 50 cents per 1,000, although under the price at which that company bought its land the actual cost would be somewhat less. If the cost of stumpage should be eliminated the profits would be increased by 50 cents per 1,000 feet. It will be seen, therefore, that this advance in the freight rate exceeds by considerable the average profit of manufacture in the Willamette Valley plus the price of stumpage.

This lumber competes with that produced at Portland and shipped from Portland by water to San Francisco. It was not denied that in the past Portland lumber had successfully met lumber from the Willamette Valley in San Francisco upon the former rates of transportation. The rate from the Willamette Valley is now increased by more than the profit in the manufacture of this lumber. There can be but one result—lumber reaching San Francisco by water must supplant that from the Willamette Valley in the San Francisco market.

The rate of \$3.10 was intended to meet the water rate from Portland and applied only at San Francisco and other bay points which could be reached by water. Lumber from Portland to an interior destination must be loaded upon the cars at the water line and transported by rail to the interior point. Lumber from the Willamette Valley to the same interior point was charged the \$3.10 rate to San Francisco plus the local rail rate from San Francisco to destination, thus maintaining the competitive equality between Portland and the Willamette. It will be seen, therefore, that the \$3.10 rate gradually increased as the distance from San Francisco Bay increased, until the \$5 limit was reached. The present rate of \$5 applies to all the territory which could formerly be reached at \$5 and less.

36 Hence the advance to points distant from San Francisco Bay is less than \$1.90 per ton by a gradually diminishing amount until it reaches the old \$5 limit.

It will also be remembered that the Willamette Valley now has an outlet to eastern destinations via Portland. When this original rate was established there could be no movement through the Portland gateway and a rate was made to eastern destinations via Sacramento. The movement to the south over the Siskiyou and afterwards to the east over the Sierra Nevada was extremely expensive, and when the Southern Pacific and the Union Pacific became united in 1901 joint rates were established for the movement of this lumber through Portland over the Union Pacific lines, where the grades were much easier and the cost of operation much less. These mills therefore reach today via Portland the same eastern destinations which they formerly reached via Sacramento. These rates from the Willamette Valley

to various eastern points are the same as from Portland, as a rule, and usually the same as from mills in Washington upon the west of the Cascades. Those rates have also been advanced and proceedings are pending before the Commission for a restoration of the original rates, but the questions involved are entirely distinct from this. The defendant apparently concedes that whatever rate is established to eastern points from Portland should also be conceded these Willamette Valley mills.

It follows, therefore, that the effect of this advance is to shut up, as to the Willamette Valley, the San Francisco market, and to limit the market in the vicinity of San Francisco. All other markets are open to these mills to exactly the same degree that they have been in the past. What, then, is the effect of withdrawing that particular market?

The timber cut at these Willamette mills is known as Oregon fir and is very similar to Washington fir except that the trees are smaller. The testimony fairly shows that grade for grade the lumber sells at the same price with Washington fir and with the same readiness. It would seem, however, that the percentage of high-grade lumber runs somewhat less with these mills than in Washington and, still further, that the poorer grades are not as good here as in Washington.

The testimony showed that this poorer lumber could not be shipped to eastern markets and that the only market in which it could be disposed of was San Francisco and points in that immediate vicinity, and this seems probable, for there are few eastern points which can be reached at less than a 40-cent rate, and it fairly appears in this case that there are to-day few if any markets to which No. 2 lumber can be shipped upon a rate as high as that. As was very truly said

37 by counsel for the defense in the argument of the Eastern Rate cases, the common board is everywhere, and the Pacific coast manufacturer can not expect to send to the east this grade of his product. These lower grades must be disposed of in comparatively nearby markets. Mills upon the coast can market this lumber by water; interior mills in Washington seem to find a considerable local market, and the same is true of Portland, but these operations in the Willamette Valley have no local market of any account and have relied in the past upon the San Francisco market for the disposing of this part of their output. To deprive them of this market or to require them to take \$3.13 per 1,000 feet less for this part of their product, which is considerable percentage of the whole, would turn a profitable into an unprofitable business.

It appears probable, too, that the effect of withdrawing this market will be more serious upon the small mill than upon the two or three large operators who are affected by these rates. In order to ship lumber long distances it must frequently be dressed and kiln-dried. The larger mills have facilities for doing this, but the smaller operations are without such facilities; nor can they afford to provide them. They must sell their lumber in the rough and they do sell a very considerable portion of it in this market.

It appeared from figures furnished by the defendants that during the year 1907, 7,108 cars of lumber moved from the Willamette

Valley via Portland and that 5,436 cars of commercial lumber moved south through Ashland. There was a further movement through Ashland of 3,326 cars of company lumber. The relative movement south was much less during this year than at any previous period, for the reason that the defendants were unable to furnish cars for the transportation of lumber in that direction. Of the cars moving south about one-half were to San Francisco and other bay points and a large proportion of the remainder were to points affected by the advance; although it should be remembered that a portion of this southern movement was dry lumber to which the \$5 rate only applied. Mr. Booth testified that about 20 per cent. of this lumber moved south under the \$3.10 rate and that the permanent withdrawal of this rate would practically shut down the operations of his company.

We can hardly agree to the claim of the complainants that a maintenance of the advanced rate would generally and permanently close these mills in the Willamette Valley. It would, in our opinion, very greatly diminish the profits otherwise obtainable from a prosecution of that business. It would limit the operations of these larger companies and would probably drive out of business for the time being many of the smaller ones. This locality is not to-day dependent upon the San Francisco market to the same extent that it was in 1898, for other markets have been developed; but that is still the only available market for any considerable quantity of the lower grades of lumber and without a market for those grades the business in this valley can not be successfully prosecuted. In time, as cost of stumpage to the Portland mill and the Puget Sound mill advances the manufacturer in the Willamette Valley will derive from the lower price of his logs an advantage which will enable him to compete in these markets upon the higher rate, but some years must elapse before that condition will be reached. Meanwhile the operator who has invested his money must suffer.

For the last ten years lumber operations upon the Pacific coast have been wonderfully profitable, and these extraordinary profits have led to an abnormal development of the business. What is true of the whole coast is true of the Willamette Valley, but in a somewhat less degree. The timber here is smaller, the expense of getting it to the mill somewhat more, the cost of manufacturing it at the mill somewhat greater, the quality of the lumber itself when manufactured somewhat poorer, or, rather, the percentage of lower grade lumber somewhat higher, all of which has put the operator in this section at a disadvantage over his competitor at Portland and in Washington. To withdraw this rate adds to that disadvantage.

The distance from Portland to San Francisco is about 750 miles. This rate of \$3.10 applied from mills just south of Portland as a blanket rate over about 250 miles up the Willamette Valley, the average distance over which lumber moved upon it being perhaps 625 miles. Upon this assumption the rate would yield about 5 mills per ton-mile.

All this lumber in reaching San Francisco must be hauled over the Siskiyou Mountains, where grades are extremely heavy and the cost

of operation unusually high. Taking the whole 750 miles the grade does not exceed one-half of 1 per cent. for 500 miles, and operating conditions over this portion of the line are favorable; but for about 250 miles grades and curvatures are severe. The steepest grade is found just after leaving Ashland for the south, where for 33 miles the heaviest engine can only haul 375 gross tons. Over the entire 250 miles 500 tons would be an average load for such a locomotive.

In practical operation it seems to be customary to make up trains at Ashland of from 20 to 25 cars and to send these trains over the mountains solid. Such a train requires for the first 36 miles out of Ashland three of these most powerful engines, but for the balance of the way can be handled by two. The fuel used is oil, which costs, reduced to the price of coal, \$2.80 per ton.

Mills in the Willamette Valley are not situated near the river and are not therefore as a rule upon the main line of the defendants, but are reached by short branch lines of different lengths. The service of collecting this lumber and putting it into the trains of the defendant upon its main line is therefore a somewhat expensive one.

The present rate of \$5 per ton is equivalent to 25 cents per 100 pounds, and the defendants insist that this rate, tested by a comparison with lumber rates in different parts of the United States, taking into account the operating conditions which obtain here, can not be regarded as extravagant.

Comparisons with other lumber rates are not conclusive nor greatly profitable, since operating conditions are seldom the same, much less, traffic and commercial conditions. The old rate of \$3.10 paid, as above stated, an average return of about 5 mills per ton-mile. There are many instances within the knowledge of the Commission where lumber has been and is now being transported for a less charge than this. The \$3.10 rate was certainly a low one, but we are satisfied that it did yield when established, has ever since yielded, and would for the future yield a substantial return over and above the cost of operation and that its maintenance in the past has contributed much to the prosperity of the defendants.

In 1898 no lumber moved from the Willamette Valley. In 1907 the defendants handled from these mills more than 12,000 carloads of revenue-paying lumber. This development of the lumber industry has not only directly contributed a large amount of traffic but has developed the entire country, and has thus added indirectly as much or perhaps even more to the net profits of the defendants. It is not susceptible of doubt that this development would not have taken place at the time it did but for the putting in of the \$3.10 rate, as previously stated.

The railroad from the southern line of Oregon north is owned by the Oregon & California Railroad Company, but these lines have been operated since before 1898 under lease by the Southern Pacific Company, which now also owns the capital stock of the Oregon & California Company.

The Southern Pacific Company in its returns to this Commission does not state separately the result of operations upon the lines of

the Oregon & California Company, and we have nothing in this case from which we can make a critical examination of the results of those operations through a series of years. It does appear that in the year 1897 the gross earnings from operation upon these lines were \$1,436,037 and operating expenses \$1,112,835, leaving net earnings of \$323,202, and that the same figures for 1907 were, gross earnings \$6,417,153, operating expenses \$4,766,350, net earnings \$1,650,803. The mileage in 1897 was 654 miles, in 1907 665 miles, of which about 300 miles are main line and the balance branches.

40 It appears, therefore, that net earnings in 1907 were more than gross earnings had been ten years before and that present net earnings are about \$2,500 per mile. When it is remembered that more than half of this mileage consists of branch lines, not expensive to construct, it would appear that the above returns are fairly compensatory.

The above figures abundantly confirm the judgment of Mr. Huntington that a rate should be made which would develop the lumber industry of this region, and in our opinion the maintenance of this \$3.10 rate would be also for the advantage of the defendants in the immediate future. These mills are established and they will continue to do business upon a margin of profit much smaller than would have been sufficient to induce their construction in the beginning. But it has been seen that their only market for poorer grades of common lumber is to the south and that without a market for this class of lumber they cannot successfully compete with other mills upon the Pacific coast.

As already suggested, when the price of stumpage has sufficiently increased in other sections, this lumber in the Willamette Valley can be manufactured at a profit upon the \$5 rate, but for the present it seems highly probable that the continuance of the lower rate is necessary to a continuance of the business itself in anything like its present volume.

Upon these facts, what conclusion should be reached as to the justice of the advance of April 18, 1907, and as to the lawfulness of the present rate? The defendants insist that the present rate is a reasonable one and that the defendant companies are under no obligation to maintain a rate which is unreasonably low for the future because they have voluntarily done so in the past. The complainants insist that the present rate is unreasonable. They say that the old rate paid the defendants a handsome profit over the cost of operation; that under it and largely by reason of it the present prosperity of these defendants has come, and that, this being so, it would be most unjust to allow them to advance it, in view of the circumstances under which it was established and has been maintained in the past. The complainants earnestly insist that we may and should look into the past history of this rate in disposing of this question.

It is not claimed that the defendants were under contract with any one shipper, nor with the general body of shippers in that region to maintain the \$3.10 rate. It is doubtful if such a contract would be valid, and at any rate no such contract was ever made. While the defendants announced that they would establish a rate of \$3.10 they

never stated that they would maintain this rate in effect for any given length of time. What happened was this:

41 It was well understood that this lumber could not be manufactured and would not be manufactured unless a rate was established from these mills to San Francisco, which was fairly equivalent to the water rate from Portland and Puget Sound points to that same market. This being so, the Southern Pacific Company had possibly two courses open to it. It might continue in effect its 25-cent rate until such time as with the depletion of forests elsewhere this timber in the Willamette Valley could be profitably marketed upon that rate. Such a course would deprive that company of immediate traffic, but would in the end give to it a much larger measure of profit from the handling of the traffic. It might, in the second place, establish the low rate and develop the industry at once in competition with mills at other points upon the Pacific coast. It elected to adopt the latter policy. It so announced to the public and to individuals who were contemplating the construction of mills in this section. It inaugurated that policy by the putting in of the rate itself. Having maintained that rate for five years, it withdrew it, but upon further consideration announced once more than it would adhere to its former policy and would restore the rate, which it did.

Upon the strength of this action these mills in the Willamette Valley have been established; they would never have been established without it; they can not profitably exist to-day without it. The expense of handling traffic under this rate is not greater than the revenue, thereby occasioning a loss which must be made up upon other business. Such a rate would present an entirely different question from that before us. Here the business is remunerative directly, beside being highly beneficial to the defendants indirectly.

In a recent communication to this Commission touching advances in freight rates, an eminent railroad authority stated that it was the universal opinion of traffic men that rates ought not to be advanced pending unfilled contracts. This is manifestly for the reason that the business public are entitled to depend, within reasonable bounds, upon the continuance of rates which have been voluntarily established.

Such has been the view of this Commission in the past. In *Bates v. Pennsylvania R. R. Co.*, 3 I. C. C. Rep., 435, the complainant was a manufacturer of corn products at Indianapolis, where he had constructed and was operating an extensive plant. For many years rates upon corn and corn products had been the same from his mill to eastern points of consumption, but the defendant company reduced the rate upon corn $4\frac{1}{2}$ cents without any corresponding reduction upon the product. It was the contention of the complainant that this change in the relation between the rate upon the raw material and the manufactured article would destroy the business which he had

42 built up. The Commission pronounced against the lawfulness of any change in the relation between the rates upon these two commodities largely upon the ground of having once established the relation the carrier was bound to stand by it.

In *Kauffman Milling Co. v. Missouri Pacific Ry. Co. et al.*, 4 I. C.

C. Rep., 417, the exact reverse of this proposition was presented. The defendant in that case made a higher rate upon the product than it made upon the raw material from St. Louis and other milling points into Texas. It was claimed that the rate should be the same and that to impose the higher rate upon the manufactured product was a discrimination against that commodity and against complainant as a manufacturer at St. Louis. The Commission pronounced, however, in favor of a differential largely upon the ground that the condition was one which had been long in existence and ought not to be unnecessarily disturbed.

No argument and no citation of authority can, however, add to the naked statement of the fact. Take, for example, the case of Mr. Miles. This gentleman had established a mill upon the strength of the \$3.10 rate, which he was operating in the year 1903. He had also made arrangements for the building of another mill and for the purchase of a large tract of timber. Hearing rumors that this rate was to be withdrawn, he suspended his operations. Subsequently, upon being assured by the officials of the Southern Pacific Company that it would continue its former policy, and relying upon the restoration of the rate itself, he resumed the construction of his mill and completed the purchase of his timber. Is it just and reasonable that within less than three years this company shall be allowed to again reverse its policy and to destroy the value of this man's property? We think not; the tremendous interests involved in the stability of railway rates must not be juggled with in this manner. We do not hold, as a general proposition, that a railroad company having established and maintained a rate is conclusively estopped from advancing that rate, nor that where a rate is put in for a special purpose it may not be taken out when that purpose has been subserved and new conditions have grown up. We apply our decision entirely to the facts in the case before us. Considering all the circumstances, having in mind the just interests of all parties, we conclude that these defendants ought to maintain, for the immediate future at least, substantially the same rate which they have maintained in the past.

It has been seen that this timber in the Willamette Valley must be given a rate to San Francisco which is substantially equivalent to the water rate from Portland. All parties were originally satisfied that the \$3.10 rate substantially met this condition. Water charters from Portland have ranged somewhat higher in the last few years than when this original rate was established; the testimony indicates from 25 to 50 cents per thousand feet. This being so
43 it seems reasonable that this lumber rate should be also somewhat advanced, and we think that for the next two years a rate of 17 cents per 100 pounds, or \$3.40 per ton, might properly be charged.

The second question presented is whether this rate shall also be applied to west side mills above Corvallis, or whether rates from those mills shall be in the future as in the past, 25 cents per ton higher than from mills upon the east bank.

It will be remembered that the main line of the defendants runs from Portland south along the east bank of the Willamette River, but that there is another line with branches extending up the west

bank of the river. Connection is made between these lines upon the west and the east at Portland and also by crossing the river from Corvallis to Albany. The road from Corvallis to Albany was formerly an independent line known as the Corvallis & Eastern. Lumber originating upon the west bank for transportation south over the lines of the defendant companies could either be hauled to Portland by the defendants and thence by their own lines south or it could be hauled by the defendants' lines south to Corvallis and thence over the Corvallis & Eastern to a connection with the main line at Albany. The rate charged by the Corvallis & Eastern for this service was 25 cents per ton. The length of the road is about 15 miles, and this would seem to be, under the circumstances, a reasonable charge.

Within a comparatively recent time it appears that the Southern Pacific interests have purchased the stock of the Corvallis & Eastern, so that that road, while still operated in name as an independent proposition, is in reality a part of the defendants' lines. The complainants insist that for this reason the charge of 25 cents should no longer be imposed against the west bank.

The cost to the defendants of handling this lumber from the west side is undoubtedly more, upon the average, than where it originates upon the east side. Rates in the past have always been higher from that section, and in our opinion there is no reason why the same difference may not exist for the future and for the same reason.

The third question arises upon the claim of the interveners that whatever rate is established from mills in the Willamette Valley should be extended to Portland. It has been seen that originally the \$3.10 rate applied to Portland, but that since 1903 this has not been true. During a portion of the time the rate from there to San Francisco has been higher than \$5, but the rate now is \$5 and this has been the ruling rate since August, 1903.

The considerations which induce us to apply this lower rate to mills in the Willamette Valley do not obtain in case of Portland. These manufacturers have the benefit of the water rate and are not therefore dependent at all upon the defendants for reaching the San

Francisco market. The low rate was only applied to Portland
44 for a comparatively short time and has not been in force there for the last four years. It is of no special importance to the manufacturer at that point and no injustice is done by withdrawing it. The distance from Portland is considerably greater than the average distance from Willamette Valley mills, and, on the whole, we think the defendants should be left to their option in meeting or declining to meet water rates at Portland. The claim of the interveners is therefore denied.

We are of the opinion, then, that the present rate of \$5 from all mills in the Willamette Valley, not including Portland, is unjust and unreasonable; that for the future from mills upon the east bank, and upon the west bank south of Corvallis, that rate should not exceed 17 cents per 100 pounds, or \$3.40 per ton, upon rough, green fir lumber and lath, and that from points upon the west bank north of Corvallis it should not exceed \$3.65 per ton. All questions of reparation are reserved for further proceedings.

An order will be issued accordingly.

HARLAN, *Commissioner*, dissenting:

The \$3.10 rate is conceded to have been a low rate, and I do not understand that the present rate of \$5 is condemned in the opinion of the Commission as unreasonable in itself and apart from the matters of estoppel on which the opinion seems largely to rest. In my judgment we are not warranted, under the act to regulate commerce as amended, in condemning a rate upon such considerations. When preference and discriminations are not alleged, the test of the lawfulness of a rate is whether as a rate for the service offered it is reasonable or excessive. This is not the test to which the rate complained of in this proceeding has been subjected as I read the opinion. It is not held to be unlawful on the ground that it is an excessive rate, but is reduced rather because of certain supposed equities existing between the complaining shippers and the defendant carriers. Without enlarging upon this view of the matter it will suffice to say that I do not understand that we are authorized to deal with a rate on those grounds.

For these reasons and also because I consider the present rate not to be an unreasonable rate I am constrained to withhold my assent to the disposition made of the complaint.

The Chairman of the Commission authorizes me to say that he joins in this dissent.

45

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 1st day of June, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan. Commissioners.

No. 1331.

WESTERN OREGON LUMBER MANUFACTURERS' ASSOCIATION, WILLAMETTE VALLEY LUMBER COMPANY, FALLS CITY LUMBER COMPANY, CURTISS LUMBER COMPANY, CHARLES K. SPAULDING LOGGING COMPANY, BOOTH-KELLY LUMBER COMPANY, J. H. CHAMBERS, H. M. PARVIN, and CRUZAN BROTHERS, Complainants, and INMAN-POULSEN LUMBER COMPANY, OREGON & WASHINGTON LUMBER COMPANY, EAST SIDE MILL & LUMBER COMPANY, STANDARD BOX AND LUMBER COMPANY, JONES LUMBER COMPANY, and ST. JOHNS LUMBER COMPANY, Interveners,

v.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and

the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered. That the defendants, the Southern Pacific Company and the Oregon & California Railroad Company, be, and they
46 are hereby, notified and required to cease and desist, on or before the 15th day of August, 1908, from charging, demanding, collecting, or receiving for the transportation of rough, green fir lumber and lath, in carloads, their present rate of \$5 per ton from points upon the east bank of the Willamette River, in the state of Oregon, and upon the west bank thereof south of Corvallis, Oreg., and upon the west bank of said river north of said Corvallis, to San Francisco, Cal., and bay points.

It is further ordered. That said defendants be, and they are hereby, notified and required to establish and put in force, on or before the said 15th day of August, 1908, and maintain in force thereafter during a period of not less than two years, and apply to the transportation of rough, green fir lumber and lath, in carloads, a rate not exceeding \$3.40 per ton from points upon the east bank of said Willamette River and upon the west bank thereof south of said Corvallis, to San Francisco, Cal., and bay points; and a rate not exceeding \$3.65 per ton from points upon the west bank of said river north of said Corvallis, to said San Francisco and bay points, not including in either rate Portland, Oreg., as a point of origin.

And it is further ordered. That said defendants be, and they are hereby, authorized to make effective upon three days' notice to the public and the Interstate Commerce Commission, given in the manner required by law, such rates as it may be necessary for said defendants, or either of them, to establish for the purpose of complying with this order. The schedules containing such rates must bear the notation that said rates are issued under the authority hereby granted, and must refer to the title and number of this case.

47 In the Circuit Court of the United States, Ninth Circuit,
Northern District of California.

SOUTHERN PACIFIC COMPANY, a Corporation, and OREGON & CALIFORNIA RAILROAD COMPANY, a Corporation, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

UNITED STATES OF AMERICA,

Northern District of California, ss:

H. A. Jones, being first duly sworn, deposes and says: I am Freight Traffic Manager of the Southern Pacific Company, and have occupied this position for nearly two years last past, and I have been engaged in this business for more than Thirty years.

I am familiar with the traffic of the Southern Pacific Company and of the Oregon & California Railroad Company, and with the conditions obtaining on the lines of said companies, relating to such traffic.

I have read the bill of complaint in above-entitled case, verified by C. H. Redington, Assistant Treasurer, and know the facts therein stated to be true of my own knowledge.

This affidavit is made to be used as an affidavit in support of said bill.

H. A. JONES.

Subscribed and sworn to before me this 24th day of July, 1908.

[NOTARIAL SEAL.]

E. B. RYAN,

*Notary Public in and for the City and County of
San Francisco, State of California.*

Subpœna ad Respondendum.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California. In Equity.

The President of the United States of America, Greeting, to Interstate Commerce Commission, a Body Corporate, Duly Organized, and Existing under and by Virtue of the Act of Congress of February 4, 1887:

You Are Hereby Commanded, That you be and appear in said Circuit Court of the United States aforesaid, at the Court Room in San Francisco, on the Eighth day of September A. D. 1908, to answer a Bill of Complaint exhibited against you in said Court by Southern Pacific Company, a corporation duly incorporated under the laws of the State of Kentucky, and thereby a citizen thereof, and Oregon & California Railroad Company, a corporation duly incorporated under the laws of the State of Oregon, and thereby a citizen thereof, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of July in the year of our Lord one thousand nine hundred and eight and of our Independence the 133d.

[SEAL.]

SOUTHARD HOFFMAN, *Clerk,*

By J. A. SCHAERTZER, *Deputy Clerk.*

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

You are Hereby Required to enter your appearance in the above suit, on or before the Second Tuesday of September next, at the Clerk's Office of said Court, pursuant to said Bill: otherwise the said Bill will be taken pro confesso.

SOUTHARD HOFFMAN, *Clerk,*

By J. A. SCHAERTZER, *Deputy Clerk.*

(Endorsed:) Summoned the Interstate Commerce Commission by service on Martin A. Knapp, Chairman, personally. August 6, 1908 Aulick Palmer U. S. Marshal, D. C. Filed Aug. 21, 1908, Southard Hoffman, Clerk, By W. B. Maling,, Dep. Cl'k.

In the Circuit Court of the United States for the Northern District of California.

SOUTHERN PACIFIC COMPANY et al.

v.

THE INTERSTATE COMMERCE COMMISSION.

To the clerk of said court:

I hereby certify that the above entitled cause now pending in said court is a suit in equity brought by the Southern Pacific Company against the Interstate Commerce Commission, under the act of Congress entitled "An Act to regulate Commerce," as amended by the act of June 29, 1906, and that said suit is in my opinion a case of general public importance.

I therefore request that, complying with the provisions of the act of Congress entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted," approved February 11, 1903; and in further compliance with the provisions contained in Section 16 of the "Act to regulate Commerce," approved June 29, 1906, you will file this certificate among the records of the above entitled cause, and immediately furnish a copy thereof to each of the Circuit Judges of the Ninth Circuit, to the end that said case shall be given precedence over other cases in said court, and be assigned for hearing at the earliest practicable date before not less than three of the Circuit Judges of said Circuit, as is provided by the said act of February 11, 1903.

CHARLES J. BONAPARTE,

Attorney General.

Washington, D. C., July 27th, 1908.

Filed August 3d, 1908.

SOUTHARD HOFFMAN, *Clerk,*

By J. A. SCHAERTZER, *Deputy Clerk.*

In the Circuit Court of the United States, Ninth Circuit, Northern District of California. In Equity.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Demurrer.

The demurrer of the Interstate Commerce Commission, the defendant above named, to the bill of complaint of the Southern Pacific Company and the Oregon & California Railroad Company, the above named complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said complainants' bill to be true in manner and form as therein set forth and alleged, files this, its demurrer, and for cause of demurrer shows that said complainants have not, as appears by their said bill made out any title to the relief therein prayed.

The defendant specially demurs to the complainants' bill, and assigns as such grounds of demurrer:

I.

That it appears from the face of the bill that all the proceedings required by the statute to be taken were duly taken and had; that after a formal complaint and answer a full hearing was had; and that the Commission arrived at its conclusion after being fully advised; that the order complained of was duly given, made, rendered and served; and that the conclusion of said Commission was not arbitrary, or reached through fraud; and, therefore, the act of the said Commission is final and conclusive and not reviewable by the Courts.

II.

That said bill does not set forth any fact or circumstance showing fraud or arbitrary action on the part of the Commission, and if it be claimed that the act of the Commission was in any way irregular or arbitrary the same is not set forth in the said bill of complaint.

III.

That it does not appear from said bill how or wherein the rate of \$3.10 mentioned in paragraph IX of said bill is or was an unreasonably low rate, nor does it appear wherein or how the rate of \$5.00 was and is a reasonable rate.

IV.

That said bill fails to state any fact or facts from which the Court can determine from the face of the bill of complaint that the rate complained of is unreasonably low or confiscatory. Said bill does not set out the cost of transportation of lumber or other merchandise, or the gross receipts of the complainants, or the gross expenses, or the net profits, or loss, as the case may be, or any other fact or circum-

stance which, if true, would show that the rate fixed by the defendant was unreasonably low.

V.

That said bill does not purport to state that the rate complained of his confiscatory, or would produce a loss to the complainants, but simply states that the rate is unreasonably low and unremunerative, without stating the amount of profit, if any, said rate would produce or what percentage of profit complainants consider to be a remunerative profit.

VI.

That the bill is indefinite, vague, uncertain, and ambiguous in this, that it states merely the conclusion of the pleader and does not allege any definite ultimate facts from which the Court could determine whether the rate fixed by the Commission in its order complained of is unremunerative and less than the cost of the service performed.

VII.

That complainants have an adequate remedy at law.

VIII.

Wherefore, and for divers other good causes of demurrer appearing in said bill this defendant demurs thereto and humbly demands the judgment of this Court whether it shall be compelled to make another or further answer to said bill; and prays to be instantly dismissed with its costs and charges in this behalf most wrongfully sustained.

UNITED STATES OF AMERICA,

State and Northern District of California,

City and County of San Francisco, ss:

Luther M. Walter makes solemn oath and says; That he is the attorney for the above named defendant, the Interstate Commerce Commission, and that the above demurrer is not interposed for purpose of delay, but that the same is true in point of fact.

LUTHER M. WALTER.

Subscribed and sworn to before me this 25th day of September, 1908.

[Seal U. S. Circuit Court.]

J. A. SCHAERTZER,
Deputy Clerk.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

LUTHER M. WALTER,
Solicitor for Defendant.

ROBERT T. DEVLIN,
U. S. Att'y.
JOSEPH N. TEAL,
Of Counsel.

Filed September 25, 1908. Southard Hoffman, clerk, By J. A. Schaertzer, deputy clerk.

At a stated term, to wit: the July term A. D. 1908, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City and County of San Francisco, on Wednesday the 30th day of September in the year of our Lord one thousand nine hundred and eight.

Present: The Honorable William B. Gilbert, Circuit Judge; the Honorable Erskine M. Ross, Circuit Judge; the Honorable William W. Morrow, Circuit Judge.

No. 14760.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD
COMPANY

vs.

INTERSTATE COMMERCE COMMISSION.

Order Sustaining Demurrer to Bill.

Defendant's demurrer to the bill of complaint herein having been heretofore heard and submitted to the Court for consideration and decision, and the same having been fully considered and the Court having rendered its opinion herein orally, it is, in accordance with said oral opinion, ordered that said demurrer be and the same hereby is sustained, and that complainants have until October 1, within which to apply to the Court for leave to file an amended bill of complaint.

At a stated term, to wit: the July term, A. D. 1908, of the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Northern District of California, held at the Court Room in the City and County of San Francisco, on Thursday, the 1st day of October, in the year of our Lord one thousand nine hundred and eight.

Present: The Honorable William B. Gilbert, Circuit Judge; the Honorable Erskine M. Ross, Circuit Judge; the Honorable William W. Morrow, Chief Judge.

No. 14760.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD
COMPANY

vs.

INTERSTATE COMMERCE COMMISSION.

Order Allowing Complainants to File an Amended Bill of Complaint, etc.

Upon motion of P. F. Dunne, Esq., on behalf of complainants, it is ordered that the complainants be and they are hereby allowed

to file the amended bill of complaint this day presented in open Court and that defendant may have until two o'clock P. M. to-day within which to plead, answer or demur to said amended bill of complaint. Thereupon, at two o'clock P. M., the defendant having filed a demurrer to the amended bill of complaint, Luther M. Walter, Esq., on behalf of defendant made argument to the Court in support of said demurrer. W. W. Cotton and P. F. Dunne, Esqrs., on behalf of the complainants, made arguments to the Court on behalf of complainants and in support of the amended bill of complaint and the further argument of said demurrer was continued to ten o'clock A. M. to-morrow.

No. 14760.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California. In Equity.

SOUTHERN PACIFIC COMPANY et al., Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Amended Bill of Complaint.

P. F. Dunne, W. W. Cotton, F. C. Dillard, C. W. Durbrow, Solicitors for Complainants.

Wm. F. Herrin, Of Counsel.

No. 14760.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California. In Equity.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Amended Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of California:

Southern Pacific Company, a corporation duly incorporated under the laws of the State of Kentucky, and thereby a citizen thereof, and Oregon & California Railroad Company, a corporation duly incorporated under the laws of the State of Oregon, and thereby a citizen thereof, by leave of Court bring this their amended bill of complaint against the Interstate Commerce

Commission, a body corporate duly organized and existing under and by virtue of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," and the various Acts supplementary thereto, hereinafter for the sake of convenience called "The Commission," and thereupon your orators complain and say:

I.

At the time of the entering of the order by the Commission hereinafter referred to, at the time of the filing of the complaint bringing about said order, and continuously since long prior to that time, your orators have been corporations organized as aforesaid, and by virtue of their charter powers engaged in the business of operating railways in the carriage of freight and passengers between States and Territories of the United States, and more particularly between the States of Oregon and California, under joint through arrangements and tariffs of rates, fares and charges, duly established, published, and filed with said Commission under said Acts of Congress to regulate commerce, to which Acts your orators are subject in the interstate carriage of freight and passengers. Each of your orators

57 now has, and during all said time has had, its principal operating office in the Northern District of the State of California. The Honorable Martin A. Knapp, who resides in the City of Washington, District of Columbia, is the Chairman and presiding officer of said Commission, and Edward A. Moseley, Esq., is Secretary thereof.

II.

The matter and amount involved in this suit exceeds the sum or value of \$2000, exclusive of interest and costs. The suit arises under the Constitution and Laws of the United States, in that, as will hereinafter appear, your orators complain that certain provisions of the Act by virtue of which the Commission fixed the rates hereinafter shown are in contravention of that Constitution; and in that your orators bring this suit under authorization of said Act to regulate Commerce, as well as under the general equity jurisdiction of this Court.

III.

The main line of the Oregon & California Railroad extends from the California-Oregon State Line through the Willamette Valley to Portland in the State of Oregon. It has sundry branch lines in said valley. The Southern Pacific Company has a line of Railway extending northward from the City of San Francisco, in the State of California, connecting at the California-Oregon State Line with the rails of the Oregon & California Railroad Company. On, and for a long time prior to April, 1907, your orator, Southern Pacific Com-
58 pany, operated as part of its system the Oregon & California Railroad, and was operating a continuous line of railway from San Francisco to Portland, carrying over it freight and passengers from one State to the other, under tariffs of rates, fares,

and charges, duly established, published, and filed with the said Commission. Prior to said April 18, 1907, your orators established a certain tariff or schedule of rates and charges known as Southern Pacific Local Tariff No. 47, I. C. C. No. 2874, which was duly published and filed with the said Commission, and which became effective on said 18th day of April, 1907. By this tariff the rate for carriage of lumber and forest products, which include rough green fir lumber and lath, between points in the Willamette Valley in the State of Oregon and various points in California, and among others to San Francisco and what are known as San Francisco Bay points, being points on the Bay of San Francisco which can be reached by carriers by vessel, and likewise by your orator Southern Pacific Company, including San Francisco, Alameda, Oakland (Market Street), Oakland (Adams Wharf), Oakland Wharf, Oakland (Sixteenth Street), Stock Yards, West Berkeley, San Pablo, Hercules, Vallejo Junction, South Vallejo, Port Costa, Benicia, Martinez, Bay Point, Peyton, Cornwall and Antioch, was fixed at \$5 per ton of 2000 pounds in carload lots. Said rate having become effective on the date aforesaid, your orators were engaged in the carriage of lumber and forest products, including rough green fir lumber and lath, at said rate, when, on or about the — day of November, 1907,

a certain complaint was filed before the said Commission by 59 the Western Oregon Lumber Manufacturers' Association and others against your orators, complaining that said rate, as applied to rough green fir lumber and lath, was unreasonable, and praying a reduction of the same. On or about the 1st day of June, 1908, the said Commission made its certain report and order, which are herewith filed and marked "Exhibit A," and prayed to be inspected and considered herewith, by which it ordered and required your orators to cease and desist on or before the 15th day of August, 1908, from charging, demanding, collecting, or receiving for the transportation of rough green fir lumber and lath in carload lots their rate of \$5 per ton of 2000 pounds from points upon the east bank of the Willamette River in the State of Oregon and points on the west bank of said river south of Corvallis, Oregon, and points upon the west bank of said river north of said Corvallis, to San Francisco, California, and Bay points; and further ordered your orators to establish and put in force on or before the 15th day of August, 1908, and maintain in force thereafter for a period of not less than two years, and apply to the transportation of rough green fir lumber and lath in carload lots, a rate not exceeding \$3.40 per ton of 2000 pounds from points on the east bank of said Willamette River and points upon the west bank thereof south of Corvallis to San Francisco, California, and Bay points, and a rate of not exceeding \$3.65 per ton of 2000 pounds from points upon the west bank of said river north of said Corvallis to San Francisco, California, and Bay 60 points, not including in either rate the City of Portland, Oregon, as a point of origin; and further ordered and required your orators to publish and make effective said rates. Said order is in words and figures as follows, to wit:

"Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 1st day of June, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1331.

WESTERN OREGON LUMBER MANUFACTURERS' ASSOCIATION, WILLAMETTE VALLEY LUMBER COMPANY, FALLS CITY LUMBER COMPANY, CURTISS LUMBER COMPANY, CHARLES K. SPAULDING LOGGING COMPANY, BOOTH-KELLY LUMBER COMPANY, J. H. CHAMBERS, H. M. PARVIN, and CRUSAN BROTHERS, Complainants, and INMAN-POULSON LUMBER COMPANY, OREGON & WASHINGTON LUMBER COMPANY, EAST SIDE MILL & LUMBER COMPANY, STANDARD BOX & LUMBER COMPANY, JONES LUMBER COMPANY, and ST. JOHN LUMBER COMPANY, Interveners,

vs.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

61 It is ordered, that the defendants, the Southern Pacific Company and the Oregon & California Railroad Company, be and they are hereby notified and required to cease and desist, on or before the 15th day of August, 1908, from charging, demanding, collecting, or receiving, for the transportation of rough, green fir lumber and lath, in carloads, their present rate of \$5 per ton from points upon the east bank of the Willamette River, in the State of Oregon, and upon the west bank thereof south of Corvallis, Oreg., and upon the west bank of said river north of said Corvallis, to San Francisco, Cal., and bay points.

It is further ordered, that said defendants be and they are hereby notified and required to establish and put in force, on or before the said 15th day of August, 1908, and maintain in force thereafter during a period of not less than two years, and apply to the transportation of rough, green fir lumber and lath, in carloads, at a rate not exceeding \$3.40 per ton from points upon the east bank of said Willamette River, and upon the west bank thereof south of said Corvallis, to San Francisco, Cal., and bay points; and a rate not exceeding \$3.65 per ton from points upon the west bank of said river north of said Corvallis, to said San Francisco and bay points, not including in either rate Portland, Oreg., as a point of origin.

And it is further ordered, that said defendants be, and they are hereby authorized to make effective upon three days' notice to the public and the Interstate Commerce Commission, given in the manner required by law, such rates as it may be necessary for said defendants, or either of them, to establish for the purpose of complying with this order. The schedules containing such rates must bear the notation that said rates are issued under the authority hereby granted, and must refer to the title and number of this case."

62 Said order was duly served on each of your orators by mailing a copy thereof to the president of your orators at his usual place of business. By further order of the Interstate Commerce Commission, the time when said order will become operative and said rates will go into effect is the 15th day of October, 1908, and unless said order is annulled, suspended or set aside by this court, it will become effective on said date.

IV.

Your orators aver and charge that in making said order and endeavoring to establish said rates, said Commission acted without warrant of law; that the said Act of 1887 to regulate commerce, and the several Acts amendatory thereof and supplementary thereto, particularly the amendment of June 29, 1906, popularly known as the "Hepburn Bill," under which said Commission professed to act, are in violation of the Constitution of the United States in that they profess to confer upon said Commission executive, legislative, and judicial powers. More specifically pleading in this behalf, your orators say: All through said Acts administrative powers are conferred upon the Commission. In section 15 the Commission is authorized to act as a court, to take judicial cognizance of complaints filed for damages, and after hearing to award damages, which award establishes a *prima facie* right in the complainant, and which no carrier against whom the award has been made can resist except by
63 assuming the burden of proof and overthrowing the *prima facie* effect of the Commission's award. The award can be resisted only under penalty of the carriers paying not only the usual costs of suit but an attorney's fee to complainant in addition if cast in the action.

By Section 15 of said Act, said Commission is authorized and empowered, after a hearing upon complaint, whenever in its opinion any rate or charge demanded, charged or collected by any carrier subject to the Act is unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, to determine and prescribe what will be the just and reasonable rate or charge to be thereafter observed in such case as the maximum to be charged, and to make an order that the carrier shall cease and desist from demanding, charging, or collecting the rate or charge complained of and condemned by said Commission, and shall not thereafter, for a period not exceeding two years, publish, demand, or collect any rate or charge in excess of the maximum rate or charge so prescribed by said Commission as a substitute for the rate or charge condemned.

Under the provisions of said Section and of Section 13 of the Act, in which the complaint containing a statement of the charges made is more particularly provided for, the Commission is empowered to proceed, and the proceeding itself is against the particular carrier or carriers, and such carrier or carriers only as are charged with unreasonableness in the matter of its or their rates; and upon
 64 hearing and trial of such carrier or carriers in said proceeding, the said Commission, under the aforesaid sections, is authorized to adjudge the rate or charge of said particular carrier or carriers to be unreasonable, and as a consequence thereof to adjudge against said particular carrier or carriers another different and lower rate as the maximum to be charged by such particular carrier or carriers in such case, for a period not exceeding two years. Such proceeding, hearing, trial, determination and judgment involve and require the exercise of judicial power by the said Commission, and 't is not competent to Congress to invest said Commission with such power; and any investiture, distribution or exercise of such power in, to or by said Commission, is in violation of the Constitution of the United States, and particularly so much thereof as provides for the distribution and exercise of the judicial authority of the United States; and herein reference is made to Section 1 of Article III of the Constitution of the United States; and the Commission has and possesses no such judicial power.

Further pleading as to that provision of Section 15 of the Act to Regulate Commerce as amended, which declares that the Commission shall prescribe what shall be the reasonable rate or rates, charge or charges, to be observed as the maximum to be charged, your orators say this provision is contrary to the Constitution of the United States, and especially to Section 1, Article I, above quoted, in that, by that article all legislative power is confined to the Congress of the United States. The prescribing of a maximum
 65 rate which carriers may charge is a legislative function. Congress has not prescribed a maximum rate to govern in the cases provided for, but by said Act delegates this power to the Commission, and in doing so places in its hands legislative power.

V.

Your orator avers that in and by Section 1 of the said Act to Regulate Commerce it is provided that all charges made by any common carrier subject to the Act, for any service rendered or to be rendered in the transportation of property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. That your orators, as the owner and operator of the railroads from Portland, Oregon, to San Francisco, California, and the franchises, equipment and appurtenances connected with such railroad, are entitled to the possession, management and beneficial use thereof, and are authorized to establish rates for the transportation of freight thereover, subject only to the provision that such rates shall be just and reasonable. In and by Section 15 of the said Act, the Interstate Commerce Commission is authorized and empowered, after hearing

upon complaint, whenever it shall be of the opinion that any of the rates or charges demanded or charged or collected by any common carrier for the transportation of property as defined in the first section of the Act are unjust or unreasonable or otherwise in violation of any of the provisions of the Act to determine and prescribe
66 what will be a just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and to make an order that the carriers shall cease and desist from such violation to the extent that the Commission find the same to exist, and shall not thereafter publish, demand or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed. That in and by said Section 15 of said Act it is provided that all orders of the Commission prescribing rates shall take effect within a reasonable time, and not less than 30 days after the making of the same, and shall continue in force for such period, not exceeding two years, as established and prescribed by the order of the Commission, unless the same shall be suspended or modified or set aside by the Commissioners, or be suspended or set aside by a court of competent jurisdiction. That in and by the 16th section of the said Act it is provided that any carrier or any officer or agent of any carrier, who knowingly fails or neglects to obey any order of the Commission prescribing rates as provided in said section of the Act, shall forfeit to the United States the sum of \$5000 for each offense, and that each distinct violation shall be deemed a separate offense, and in case of continuing violation, each day shall be deemed a separate offense.

You orator avers that the present rates of \$5 per ton, attempted to be set aside by said order, but fixed and established by your orators for the transportation of rough green lumber and lath in carloads from points upon the east bank of the Willamette River
67 in the State of Oregon, and on the west bank of the Willamette River south of Corvallis, Oregon, and on the west bank of the Willamette River north of said Corvallis, to San Francisco, California, and to the Bay points mentioned in the order of the said Commission, and each of the said rates, are and will be for more than three years hence, low, just and reasonable rates for the service performed in the transportation of said commodities between said places and each of them, and that the rates prescribed by the Commission in and by its said order, namely, a rate not exceeding \$3.40 per ton from points upon the east bank of the said Willamette River and upon the west bank thereof south of said Corvallis to San Francisco, California, and Bay points, and a rate not exceeding \$3.65 per ton from points upon the west bank of said Willamette River north of said Corvallis to said San Francisco and Bay points, not including in either of them Portland, Oregon, as a point of origin, are, and each of said rates is and will be for more than three years hence, unjust and unreasonable for the service performed in the transportation of rough green fir lumber and lath in carloads and are and will be inadequate compensation to your orators for the service rendered.

Your orators aver that by Article V of the amendments to the Constitution of the United States your orators have the right to a

judicial investigation in a court by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy of the question as to the reasonableness of the said \$5 rate so fixed and established by your orators, and of the question as to the reasonableness of the said \$3.40 and \$3.65 rates so fixed and established by the said Commission as aforesaid, and of each of said questions.

That the attempt of the Commission in and by said order sought to be set aside herein, to set aside and annul the rates established by your orators, and the establishing of the said rates prescribed by said orders and each of them by the said Commission, against the will of your orators, was *pro tanto*, the taking of the property of your orators and depriving your orators thereof without due process of law, in violation of Article V of the Amendments to the Constitution of the United States; and that the making of the said order of the Commission herein set out was *pro tanto* a taking and depriving the Company of its property without due process of law, in violation of Article V of the Amendments to the Constitution of the United States, and thereby void and of no effect.

Your orators further aver that the attempt of Sections 15 and 16 of the said Interstate Commerce Act to make any order of the Commission prescribing rates to be charged for the transportation of property become effective of its own force prior to a hearing in a court of justice of the question of the reasonableness of the rates prescribed

by said order and said Sections 15 and 16 in that regard are void for the reason that in and by Section 1, Article III of the Constitution of the United States all judicial power is conferred upon a Supreme Court of the United States and such inferior courts as Congress may establish, and the Judges of said Supreme Court and such inferior courts shall hold office during good behavior, and the said Commission has no power to prescribe any time upon which any order of the said Commission prescribing rates for the transportation of property to take effect, and that the said order of the said Commission is void and of no effect.

That Section 16 of said Act is unconstitutional and void in that it is therein provided that your orators and each of them, and any officer or agent of your orators, knowingly failing or neglecting to obey the said order of the Commission herein set forth, shall forfeit to the United States the sum of \$5000 for each day that your orators or said officers or agents fail to obey said order, notwithstanding that the question of the reasonableness of the rates established by the said order have not been judiciously investigated by due process of law in any court of justice, and in that said section makes said order a finality unless suspended by the Commission or by some court of competent jurisdiction, and subjects your orators to penalties and forfeitures as therein provided, and deprives your orators of their property without due process of law, contrary to Article V of

the Amendments to the Constitution of the United States, and the force and effect of said order sought to be enjoined and set aside herein is under said Act and will be unless enjoined

and set aside by this court before October 15, 1908, to cause your orators' property to be forfeited through the operation of such penalties, and will subject the agents of your orators to such penalties, notwithstanding said penalties are only imposed because of said order of said Commission attempting to prescribe and establish such rates, or will be to compel your orators in order to avoid such penalties to put into effect before October 15, 1908, the unreasonable rates so attempted to be prescribed by said Commission in and by said order.

VI.

Making specific reference to the opinion of the Commission herewith filed, your orators aver and charge that the Commission did not, and it affirmatively appears from said opinion that they did not find the rate of \$5 per ton to be unreasonable, but your orators aver found such rate to be reasonable in and of itself. Your orators say it further appears from the said opinion and the truth is, the Commission not only failed to find the rate of \$3.10 or the rates established by them to be reasonable, but on the contrary specifically found the rate of \$3.10 to be a low rate, and found the rates established by them to be, as in truth they are, substantially the same as the rate of \$3.10, and thus also low rates. Yet because of matters extraneous to the question of the reasonableness of the rate, the Commission ordered your orators to desist from charging the rate of \$5 per ton, and ordered them to charge rates not exceeding the amounts fixed by them as above shown, thus fixing as maxima, rates not found by them to be reasonable, but on the contrary found to be low. The Commission's only power under the Act is to fix a rate as a maximum for the future which shall be a just and reasonable rate for the particular service rendered. In reducing the rate in this case to an amount less than this and which is not a fair return for the service rendered the Commission mistook the law and misinterpreted their powers.

VII.

Your orators aver the Willamette Valley lies in the State of Oregon commencing at the Columbia River and extending southward a distance of about 150 miles, with the Willamette River flowing throughout it. Near the mouth of the Willamette River is situated the City of Portland, on the waters of that river. The Willamette River flows into the Columbia River, which in turn flows into the Pacific Ocean, and these rivers are navigable for ocean-going vessels from Portland to the ocean. Between the mouth of the Columbia River and Puget Sound is Gray's Harbor. The cities of Seattle and Tacoma in the State of Washington are situated on an inlet from the Pacific Ocean, navigable for ocean-going vessels. About the cities of Portland, Tacoma and Seattle, about Gray's Harbor and other places having communication by vessel with San Francisco and Bay points, are extensive lumber producing forests, and at these
72 places in the years 1897 and 1898 there were mills for the manufacture of lumber, and continuously since then the manufacture of lumber has been carried on there. Between these places and the City of San Francisco and other San Francisco Bay points,

vessels ply carrying lumber. For such lumber as was manufactured, or might be manufactured, in the Willamette Valley south of Portland, there then was no through rate through Portland to the territory lying east of Portland, and no rate which would permit of lumber being thus marketed. About the year 1898 certain persons engaged in the manufacture of lumber and operating mills at Saginaw and Coburg in that valley, sought of the Southern Pacific Company the establishment of a low rate from these points to San Francisco, one low enough to meet water competition from the points above named, from which lumber could move by ocean-going vessels to San Francisco and Bay points.

In 1897 the lumber rate had been \$5 from Portland, Coburg and Saginaw to San Francisco and Bay points, Stockton, Sacramento, San Jose and Santa Clara. On April 25, 1898, this rate was reduced to \$4 from Portland and East Portland, to San Francisco, Vallejo Junction and Oakland, but remained unchanged so far as the other points were concerned. On June 6, 1898, the \$4 rate was extended to said Valley points, applying therefrom from Portland, Albany, Coburg and Saginaw to San Francisco and Bay points, but remained at \$5 to the other named California points. On April 22, 1899, the said \$4 rate from Portland, Albany, Coburg and Saginaw to
 73 San Francisco Bay points was lowered to \$3.10, and lowered to \$3.50 to the other California points. On the 1st of January, 1900, the said rate from Portland and the other named Willamette Valley points was extended south on the Woodburn-Springfield branch of the Oregon & California Railroad south to Tallman. On the 13th of August, 1902, said rate from Portland to Willamette Valley points was still farther extended, reaching south of Drain as far as Glendale, and being so applied until August 20, 1903, when said rate was withdrawn from Portland. The aforesaid reductions in said lumber rate were made with reference to water competition and in aid of the development of the industries in which the said persons were engaged.

These rates were low, less than what was just and reasonable for the services rendered, and were so known to be by persons shipping under them, but were made to meet the water competition above shown. There was no contract or agreement or representation that your orators would maintain a rate of any specific amount, or that they would maintain any rate which they might establish for any given time.

On the withdrawal of the \$3.10 rate from Portland, a rate of \$5 was established there. But the rate of \$3.10 remained applicable to practically all points manufacturing lumber in the Willamette Valley, other than Portland, and to and including Glendale, as aforesaid, except that from points west of the river at certain places and on the Wendling Branch the rate was 25c per ton more.

74 At the time of the existence of this rate to San Francisco Bay points, your orators also had in existence a scale of rates to what is known as San Francisco Bay District, which included points near by the Bay points, and to which the rate was made by adding to the \$3.10 to San Francisco Bay points the local to the places of delivery until the maximum of \$5 was reached. Outside of the

Bay points and Bay District points the rate from Willamette Valley points to other points in California beyond the Bay District exceeded the sum of \$5. Since 1898 many mills have been built in the Willamette Valley, until there are now in that valley south of Portland about 250 mills. About January, 1904, your orators replaced the rate to San Francisco Bay points and to Bay District points by a rate of \$5 per ton of 2000 pounds; that is to say, the rate of \$5 from Willamette Valley points took the place of the rate of \$3.10 to Bay points, and of the rate of \$3.10 plus the local rate to Bay District points. At the earnest solicitation of certain lumber manufacturers, your orators about May, 1904, restored from Willamette Valley points the rate of \$3.10 as applied to rough green fir lumber and lath to San Francisco and Bay points, and the \$3.10 scale to San Francisco Bay District points. Said \$3.10 rate as a basis plus the local rate to San Francisco Bay District points, until the maximum of \$5 was reached, was made applicable from Portland to said Bay District points at and from the time that the said \$5 rate from Portland to San Francisco Bay points was established, and concurrently therewith. But there was no contract to maintain such rates, and there was no contract or agreement that these rates should be maintained for any given length of time. April 18, 1907, your orators withdrew the \$3.10 rate and scale as applied to rough green fir lumber and lath, and applied the rate of \$5 as is above pleaded.

At the time the rate of \$3.10 was first established, there was as aforesaid no movement of lumber from the Willamette Valley via Portland to the East, but lumber from the valley moved southward over the lines of your orators, and such as moved East went over the lines of the Southern Pacific Company and connections to Utah, Colorado, Nevada, Arizona and other States and Territories. During all this time lumber from Portland and other points in Oregon, and Washington, lying upon the waters navigable for ocean vessels, moved to San Francisco and Bay points. In the year 1901 Portland was opened as a gateway to the East for lumber from the Willamette Valley, and the same rate was applied through Portland to all points east of Pocatello, Idaho, that applied to lumber originating at Portland or other points in Oregon or Washington west of the Cascade Mountains. To points west of Pocatello was applied the rate from Portland, plus the local rate from point of origin to Portland. The route from the Willamette Valley to the south passes over the Si-ki-you Mountains and over a way where the grades are severe, reaching as much as 3.3 per cent.; where only small trains can be handled and the expense of operation is great. By the year 1907 about two-thirds of the lumber from the Willamette Valley moved to the East via Portland, and only about one-third to the South over the lines of your orators, and of the total output of the Willamette Valley so moved, less than 20 per cent. was destined to San Francisco Bay and Bay District points, and about 15 per cent. to San Francisco Bay points. These percentages include all kinds of lumber, of which percentages, as your orators are informed and believe, the rough green fir lumber and lath would not

exceed 60 per cent. At that time less than 20 per cent moved into the territory affected by the rate of \$3.10.

VIII.

Your orators aver that the facts set forth in the preceding paragraph (No. VII) appeared on the hearing before the Commission without dispute. The Commission did not adjudge the rate established by your orators under their tariff effective April 18, 1907, to San Francisco and Bay points to be unreasonable in itself as applied to the carriage of rough green fir lumber and lath, or greater than is warranted by the cost and value of the service rendered; but did find a rate of \$3.10 to be a low rate. The Commission raised the rates from \$3.10 and \$3.35 to \$3.40 and \$3.65 respectively, but made this slight raise only because there had been some increase in charter rates, and held, as indeed the truth is, that the rates are substantially the same as the former rates. They held that the rates in existence prior to April 18, 1907, had been established by your orators under

77 the circumstances shown in paragraph VII above; that on the faith of these rates the lumber industry had been developed in the Willamette Valley, and that your orators were therefore estopped from making an advance in the rates as made by them, but that your orators must for the indefinite future continue from points in the Willamette Valley to San Francisco Bay points unreasonably low rates for the service rendered by your orators in the transportation of rough green fir lumber and lath. That in and by the report of the Commission in the proceeding wherein was made the order sought to be set aside the following statement was made:

"Take, for example, the case of Mr. Miles. This gentleman had established a mill upon the strength of the \$3.10 rate, which he was operating in the year 1903. He had also made arrangements for the building of another mill and for the purchase of a large tract of timber. Hearing rumors that this rate was to be withdrawn, he suspended his operations. Subsequently, upon being assured by the officials of the Southern Pacific Company that it would continue its former policy, and relying upon the restoration of the rate itself, he resumed the construction of his mill and completed the purchase of his timber. Is it just and reasonable that within less than three years this company shall be allowed to again reverse its policy and to destroy the value of this man's property? We think not; the tremendous interests involved in the stability of railway rates must not be juggled with in this manner. We do not hold, as a general proposition, that a railroad company having established and maintained a rate is conclusively estopped from advancing that rate, nor that where a rate is put in for a special purpose it may not be taken out when that purpose has been subserved and new conditions

78 have grown up. We apply our decision entirely to the facts in the case before us. Considering all the circumstances, having in mind the just interests of all parties, we conclude that these defendants ought to maintain, for the immediate future at least, substantially the same rate which they have maintained in the past."

Your orators aver that by reason of the case of the said Miles

therein stated, said Commission made said order requiring your orators to establish from points in the Willamette Valley to San Francisco Bay points unreasonable, low rates for the service rendered by your orators in the transportation of rough green fir lumber and lath, and required your orators in and by said order to maintain said rates for a period of two years, and held that by reason of the case of the said Miles as therein stated, your orators were estopped from making an advance in the rates as made by them, and your orators are advised and believe that in so treating your orators as estopped, the Commission mistook and exceeded their powers under the Act to regulate commerce.

At the time that this cause was tried before the Commission there was tried the case of Oregon & Washington Lumber Manufacturers' Association *et al. v. Union Pacific Railroad Company et al.*, I. C. C. Docket No. 1327, involving the rates on lumber from various points in the States of Oregon and Washington, including the Willamette Valley to Eastern points. In said case the Commission used and applied to the rates then under consideration, this language:

79 "Competitive rates made by the several carriers serving the different points of production may be lower than they could be compelled to make. The law permits the making of a competitive rate to the extent above mentioned, but there is no law that requires the carriers to go to that extent. This controversy cannot be determined wholly upon the ground that complainants have enjoyed the lower rate for many years, and that interests have been built up thereunder, and that loss of business, investments, profits and markets will result under the increased rates. It must be determined on the justness or reasonableness of the rates in controversy. Neither do the interests of the public require that lumber should be transported at other than just and reasonable rates."

And in referring to the rates, also used and applied to the rates then under consideration this further language:

"It must be justified on the ground that it is just and reasonable regardless of a prosperous condition of the industry affected, or where it will be absorbed. So that we have these propositions: If the old rates were too low to be just and reasonable, complainants cannot urge their loss as a ground for maintaining them; if the old rates were just and reasonable, the defendants cannot justify the advance on the ground of the prosperity of the lumber business, or that the loggers will absorb the increase in the decreased price of raw material."

Your orators aver that the Commission exceeded in their holdings by which they reduced your orators' rates in this case any power granted them by law; that in so holding, the Commission attempted not to determine the reasonableness of the rates, as was their only power under the Act to regulate commerce, but to adjudicate

80 a question of estoppel between shippers and the railways, arising out of the conduct of the latter, and to establish for the future a rate less than a reasonable rate and less than the just and reasonable value of the service rendered in the transportation

of the lumber to which the rate is applied, as the result of such adjudication, and attempted to require your orators to establish from points in the Willamette Valley to San Francisco Bay points unreasonably low rates for the purpose of meeting rates made by water carriers engaged in transporting lumber from ports on the Columbia River, Gray's Harbor, and on Puget Sound, to such San Francisco Bay points.

And your orators aver that on and by the premises aforesaid the Commission proceeded to a decision and conclusion upon a mistake and misconception of the law, and that their decision, conclusion and order herein are and each of them is based upon a misconception and mistake of the law.

IX.

Your orators aver that the rates of \$3.40 and \$3.65 per ton as ordered and prescribed by said Commission were and are unreasonably low rates, and will so continue to be during the period fixed for the application of the same by the said Commission, and are less than what is and will be during said period just and reasonable for the service rendered, and the said rates do not and will not during said period pay the cost of the service rendered; and that the rate of \$5 per ton was, is and will be for the period fixed by said Commission no greater than a just and reasonable rate for the service rendered in the transportation of rough green fir lumber and lath from points in the Willamette Valley to San Francisco, California, and Bay points.

Your orators further aver that there was heard and decided by the Commission the case of Oregon and Washington Lumber Manufacturers' Association *et al.* against Union Pacific Railroad Co. *et al.* No. 1327, at the same time the Willamette Valley lumber case in which the order sought herein to be enjoined was made. The Commission fixed lumber rates for much longer distances over less expensive and difficult distances than over the more expensive and difficult route involved in said Willamette Valley lumber case. That is to say, said Commission on the lumber rate from Portland to Omaha, a distance of 1799 miles, prescribed a rate of 50 cents per 100 pounds, or .550 cents per ton per mile; Portland to Denver, 1400 miles, 40 cents per 100 pounds, or .570 cents per ton per mile; Seattle to Salt Lake City, 1089 miles, 40 cents per 100 pounds, .734 cents per ton per mile; Portland to Cheyenne, 1283 miles, 40 cents per 100 pounds, or 62 cents per ton per mile. That each and all of said rates so fixed and established by the said Commission were fixed and established by the Commission as just and reasonable rates for the transportation service rendered, and each and all of said rates applied to rough green fir lumber and lath. It is a fact in railway operations, and it is everywhere conceded, including the reports and decisions of the Commission and the courts, that as the distance increases the cost per ton per mile decreases. Your orators aver that upon the hearing of the complaint before the Commission, it was conceded by complainants that the rate of \$3.10 was a low rate, one of the lowest rates on lumber in the United States. It was also conceded that the rate of \$5 was, in and of itself,

a reasonable rate, and that demand would not have been made for its reduction if the lower rate had not been originally established. The evidence introduced on the trial of the cause before the Commission showed that the former rate of \$3.10 was an exceedingly low rate; that the rate of \$5 is in and of itself a reasonable rate for the service performed, and nothing appeared to the contrary. Wherefore, your orators charge that upon the undisputed facts it was the duty of the Commission not to reduce the rate of \$5, and especially that they had no power to reduce the rate to the amounts at which they fixed them as maxima to be charged, when such amounts were conceded and shown to be unreasonably low.

Your orators will produce on the hearing hereof a full transcript of the evidence introduced on the hearing before the Commission and of the statements of counsel, and pray your Honors that the same be considered in connection with and in support of this bill.

X.

Your orators aver that in establishing, and, after it was once withdrawn, in restoring the recognized low rate of \$3.10, they
83 did not directly or indirectly promise or agree that they would maintain it for any time. They in no way abandoned their discretion to increase the rate when their judgment indicated it should be increased; nor was there any promise that the rate for the future should be governed by the water rates or made with regard to them, but the doing of this was retained within the discretion of your orators.

Your orators deny that any mills were built in the expectation that the rates established, or practically the same rates, would be maintained, or in expectation that your orators would abandon their right to increase the rates as the exigencies of traffic might demand and the judgment of your orators should dictate. They deny that any one had the right to harbor any such expectation.

Your orators say that in the last several years the lumber business has greatly increased, forests of white pine have been depleted, the demand upon the yellow pine forests has been large. The result has been a great demand for lumber from the forests of the Pacific Coast, with a consequent handsome profit in the manufacture of it, and the value of said lumber has greatly increased. Your orators aver it is because of these conditions, and because lumber manufacturers expected to reap much profit, that the lumber industry has so grown on the Pacific Coast, including the Willamette Valley.

As above appears, at the time the rate of three dollars
84 and ten cents (\$3.10) was established the only market for lumber from Willamette Valley was to the South. Since the opening of the Portland gateway, as was stated by witnesses for complainant on the hearing before the Commission, and as is true, the market thus opened up to Willamette Valley mills is their most desirable and profitable market.

At the time the rate of three dollars and ten cents (\$3.10) was established, lumber in the Willamette Valley was of comparatively little value. Since said time it has greatly increased in price and

value until at the time of the establishment of the rate of five dollars (\$5), in 1907, it was worth about double what it was worth at the time of the establishment of the rate of three dollars and ten cents (\$3.10).

At the time of the establishment of the rate of three dollars and ten cents (\$3.10), the low price of lumber and restricted demand for it, and the fact that the mills of the Willamette Valley could profitably seek markets only through the lines of your orators and south of Portland, the establishment of a low rate was esteemed a wise thing to do by your orators. Owing to changed conditions the continuance of that rate, or one approximately as low, is not necessary to the prosperity of the lumber industry, and would be to force your orators to carry lumber at an unreasonable and unremunerative rate.

Your orators say that when the rate of \$3.10 was first established, probably the very great bulk of the lumber from the Willamette Valley went to San Francisco and Bay points, but that at the time of the establishment of the rate of five dollars (\$5), as above appears, about two-thirds ($\frac{2}{3}$) of the lumber from Willamette Valley sought the markets of the East through the Portland gateway, and less than twenty per cent. (20%) went to San Francisco and Bay points. The true amount was about fifteen per cent. (15%).

Your orators aver that no power exists in the Commission and duty rests upon carriers to make rates so low that shippers may find a market, and they further aver that no duty rests upon them of making or continuing a rate at so low a figure that products carried by them shall find a market in the same place where they come into competition with products carried by water, but that the option is left with the carrier to meet water competition. They aver, however, upon information and belief, that shippers of rough green fir lumber and lath from the Willamette Valley can still reach the markets of San Francisco and Bay points at a profit. Your orators say, further, that it is a fact that in the manufacture of lumber it is the average profit which is considered by the lumbermen. In such manufacture, some lumber is sold at large profit beyond cost of manufacture, some at much less profit, some at no profit, and some of the lower grades are sold at less than the cost of manufacture. Your orators aver that the shippers of the Willamette Valley have no right to demand or expect of your orators that they shall make a rate of carriage so low upon their common grades of lumber that these grades can reach a market at an average distance of more than six hundred (600) miles from the point of production, and there be sold at a profit in competition with lumber moving to those points by water.

XI.

Your orators say that since the establishment of the rate of three dollars and ten cents (\$3.10) the cost of operation of all railways, including those of your orators, has vastly increased; that labor and material have so increased in price that rates then reasonable are not so now.

Your orators say that in handling this traffic they have to transport it over a line, 250 miles of which can be operated only at a great expense. The gradients and curvatures are such that only light trains can be hauled, and many engines have to be used. This line of railway passes over the Siskiyou Mountains, which rise abruptly to a height of 4124 feet. In a distance of fifteen (15) miles the road rises over a peak 2388 feet. At this point the most powerful engine of your orators, being an engine of four (4) drivers, and weighing 171.5 tons, can only handle 345 gross tons. For a distance of 47 miles an engine of that type can only handle 530 gross tons; for a distance of 49 miles only 700 gross tons; and for a distance of 107 miles only 500 gross tons; and for 36 miles only 345 gross tons. Over 203 miles of your orators' line helper engines
87 have to be used. At some places it takes one helper engine, or two engines, to handle light trains, and for a distance of 36 miles it takes three engines to handle the trains. All of which entail a very heavy expense of operation. Your orators' line is so situated that it is subject to frequent washouts, making the track difficult to keep in condition for operation and causing heavy expense for repair. And your orators' line of railway in said Willamette Valley and from points therein to San Francisco is one of the most difficult and expensive lines of railway in the United States to operate and maintain.

The lumber moving from Willamette Valley is gathered largely from branch lines maintained almost solely for lumber and operated at heavy expense. Freight moves in much greater quantities from the Willamette Valley to the South than from the South into the valley. This brings about a large movement of empty cars to the North for the hauling southward of lumber from the valley.

Your orators aver that for some time before it was changed, the rate of three dollars and ten cents (\$3.10) was not a remunerative rate. They aver and charge that the rates established by the Commission will prove unremunerative.

Your orators say that by reason of the conformation of the Willamette Valley, and by reason of water competition made by the Willamette and Columbia rivers and the ocean, traffic conditions in the valley are unusual and demand the judgment
88 and discretion of experienced traffic men constantly in touch with those conditions. From their experience with those conditions, and satisfied that the rate of five dollars (\$5) is just and reasonable to shippers, they establish the same. They aver that said rate is reasonable and say that the establishment of any rate less than this would be unreasonable.

Upon the hearing hereof your orators will produce sundry affidavits which they pray may be considered in connection with and in support of this bill.

XII.

Your orators say that if the rates established by the Commission are permitted to go into effect and shall ultimately be held to be unreasonable, your orators will suffer irreparable injury; that judg-

ing from the past, your orators believe the movement of cars per year from Willamette Valley mills to San Francisco and Bay points will be about one thousand (1,000); that the average loading of said cars is about twenty-nine (29) tons; of said cars eight hundred (800) would move under the three dollars and forty cents (\$3.40) rate, and two hundred (200) under the rate of three dollars and sixty-five cents (\$3.65), so that if the rates established by the Commission are permitted to go into effect, but ultimately held to be bad, your orators will lose the amount above indicated; that until the establishment of a new rate your orators will be forced to carry lumber at said
 89 unreasonable rate, thus suffering irreparable injury in the reduction of their just revenues.

Your orators say that since the 18th day of April, 1907, they have been carrying lumber to San Francisco and Bay points at the rate of five dollars (\$5) per ton. If the rates established by the Commission are permitted to go into effect there will be a multiplicity of claims for reparation and suits against your orators, against which they would have no adequate protection. Your orators say they are without any adequate remedy, except as your Honors may grant to them a writ of injunction as herein prayed for.

XIII.

To the end that your orators may obtain the relief to which they are entitled in the premises, they now pray:

First. That upon the filing of this bill your Honors will grant all such temporary and interlocutory restraining orders suspending the enforcement of the order of the Commission as may be necessary pending the further hearing of the matters of this bill.

Second. That this bill be set down for further hearing on a day certain to be named by your Honors, and that said Commission be given notice thereof and called upon to show cause why there should not be granted a preliminary injunction suspending their said order, and enjoining them, their officers, agents, servants and
 90 representatives, from enforcing the same, or instituting any suits or taking any proceedings to enforce the same until final determination of this case; and that upon such day so fixed

by your Honors, or as speedily thereafter as practicable, your Honors grant a preliminary injunction so suspending such order, and so enjoining said Commission, its officers, agents, servants and representatives.

Third. That upon final hearing said preliminary writ of injunction be made perpetual, and that it be decreed that said order of said Commission shall be forever set aside, annulled, and held for naught, and that said Commission, its officers, agents, servants and representatives, be forever enjoined from enforcing or taking any steps to enforce the same.

Fourth. That there be granted to your orators process of subpoena to said defendant the Interstate Commerce Commission, requiring them to duly appear and answer (but not under oath, the same being expressly waived) the several allegations of this bill.

Fifth. Your orators further pray for such other general and special relief as in equity and good conscience is meet and proper

SOUTHERN PACIFIC COMPANY,
OREGON & CALIFORNIA RAILROAD
COMPANY,

By C. H. REDINGTON,

Assistant Treasurer.

[S. P. Co.'s Seal.]

P. F. DUNNE,
W. W. COTTON,
F. C. DILLARD,
C. W. DURBROW,

Solicitors for Complainants.

WM. F. HERRIN,
Of Counsel.

91 COUNTY OF SAN FRANCISCO,
State of California, ss:

I, C. H. Redington, being duly sworn, say that I am Assistant Treasurer of the Southern Pacific Company and of the Oregon & California Railroad Company, and that I sign the corporate name of complainants to the foregoing bill and attach the corporate seal. I further say that I have read the foregoing bill of complaint and that the allegations therein contained are true, except where made upon information and belief, and where so made I believe them to be true.

C. H. REDINGTON.

Sworn and subscribed to before me, H. T. Sime, a Notary Public in and for the County of San Francisco, in the State of California, this 1st day of October, 1908.

[NOTARY'S SEAL.]

H. T. SIME.

92 To the said amended bill was attached Exhibit A aforesaid, which said Exhibit A is the same as Exhibit A attached to the original bill of complaint.

Whereupon, on the 1st day of October 1908, the Interstate Commerce Commission filed its demurrer to said amended bill of complaint, in letters, figures and form as follows:

In the Circuit Court of the United States, Ninth Circuit, Northern District of California. In Equity.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Complainants,

v.

INTERSTATE COMMERCE COMMISSION, Defendant.

Demurrer.

The Demurrer of the Interstate Commerce Commission, the defendant above named, to the Amended Bill of Complaint of the Southern Pacific Company and the Oregon & California Railroad Company, the above named complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said complainants' amended bill to be true in manner and form therein stated, set forth and alleged, files this its demurrer; and for cause of demurrer shows that said complainants have not, as appears by said amended bill, 93 made out any title to the relief therein prayed.

The defendant specially demurs to complainants' amended bill, and assigns as such grounds of demurrer:

1.

That it appears from the face of the said amended bill that all the proceedings required by the statute to be taken were duly taken and had; that after a formal complaint and answer a full hearing was had; and that the Commission arrived at its conclusion after being fully advised; that the order complained of was duly given, made, rendered and served; and that the conclusion of said Commission was not arbitrary, or reached through fraud; and, therefore, the act of the said Commission is final and conclusive, and not reviewable by the courts.

2.

That said amended bill does not set forth any fact or circumstance showing fraud or arbitrary action on the part of the Commission, and if it be claimed that the act of the Commission was in any way irregular or arbitrary the same is not set forth in the said amended bill of complaint.

III.

That it does not appear from said amended bill how or wherein the rates of \$3.10, \$3.40 or \$3.65 mentioned in said amended bill are, or that either or any of said rates is, or was, or will be, an unreasonably low rate; nor does it appear how or wherein the rate of \$5.00 mentioned in said amended bill was, is, or will be, a reasonable rate.

94

IV.

That said amended bill fails to state any fact or facts from which the court can determine from the face of the amended bill of complaint that the rates complained of are unreasonably low or confiscatory. Said amended bill does not set out the cost of transportation of lumber or other merchandise, or the gross receipts of complainants, or the gross expenses, or the net profits or loss as the case may be, or the cost of the carriage of a ton of lumber in carload lots from points in the Willamette Valley, exclusive of Portland, to San Francisco or Bay points, or any other fact or circumstance which, if true, would show that the rates fixed by the defendant were unreasonably low or confiscatory.

V.

That each and every portion of the amended bill which avers that the Act to Regulate Commerce as amended is unconstitutional does not state any ground for equitable relief.

VI.

That said amended bill does not state in facts well pleaded that the rates complained of are confiscatory, or would produce a loss to the complainants, but simply states that the rates complained of are unreasonably low and unremunerative, without stating the amount of profit, if any, said rates would produce, or what percentage of profit complainants consider to be a remunerative profit, and without stating in what degree, if any, or in what manner the rates fixed by the defendant are below the cost of the service.

95

VI.

That the amended bill is indefinite, vague, uncertain and ambiguous in, that it states merely the conclusion of the pleader, and does not allege any definite ultimate facts from which the court can determine whether the rates fixed by the Commission in its order complained of are unremunerative and less than the cost of the service performed.

VII.

That complainants have an adequate remedy at law.

VIII.

That from said amended bill of complaint there appear no facts which meet the objections urged by defendant, and found well founded by the court, to the validity of the original bill herein.

IX.

Wherefore, and for divers other good causes of demurrer appearing in said amended bill, this defendant demurs thereto, and humbly demands the judgment of this court whether it shall be compelled to make any other or further answer to said amended bill, and prays to be instantly dismissed, with its costs and charges in this behalf most wrongfully sustained.

UNITED STATES OF AMERICA,

State and Northern District of California,

City and County of San Francisco, ss:

Luther M. Walter makes solemn oath and says: That he is the attorney for the above named defendant, the Interstate Commerce Commission, and that the above demurrer is not interposed
96 for purpose of delay, but that the same is true in point of fact.

LUTHER M. WALTER.

Subscribed and sworn to before me, this 1st day of October, 1908.

[SEAL.]

J. A. SCHAERTZER,

Deputy Clerk U. S. Circuit Court, Northern

District of California.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

LUTHER M. WALTER,

Solicitor for Defendant.

JOSEPH N. TEAL,

Of Counsel.

ROBT. T. DEVLIN,

U. S. Att'y, of Counsel.

The matter coming on for argument upon the demurrer to the said amended bill of complaint, and the same having been fully argued, the Court was divided in opinion as to whether said demurrer should be sustained. We hereby certify that the evidence and proceedings before the Interstate Commerce Commission, referred to in the said amended bill of complaint and filed therewith, are in words and figures as follows:

97 Interstate Commerce Commission, Washington.

I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached are true copies of the original transcript of the stenographer's notes of the testimony taken before said Commission on December 20 & 21, 1907, at Washington, D. C., in the case of the Western Oregon Lumber Manufacturers' Association *et al. v. Southern Pacific Company et al.* and of the exhibits to said testimony, with the exception of Anderson exhibit No. 2, page 42, now on file and of record in the office of said Commission.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the Commission this Eleventh day of July, 1908.

[Seal Interstate Commerce Commission, 1887.]

EDW. A. MOSELEY, *Secretary.*

98

Stenographer's Minutes.

Before the Interstate Commerce Commission.

Dec. 24, 1907, Chicago, Ill.

Docket No. 1331.

WESTERN OREGON LUMBER MANUFACTURERS' ASSOCIATION ET AL.

vs.

SOUTHERN PACIFIC COMPANY ET AL.

At Washington, D. C., December 20-21, 1907.

Witnesses.

Direct.

Cross.

Re-direct.

Re-cross.

Some points rate as high as 8.75, p. 49.

Lumber went into Arizona on a \$11.00 rate, p. 63.

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Before the Interstate Commerce Commission.

No. 1331.

WESTERN OREGON LUMBER MANUFACTURERS' ASSOCIATION ET AL.
vs.

SOUTHERN PACIFIC COMPANY ET AL.

WASHINGTON, D. C., *December 20, 1907.*

The Commission met at 10 o'clock a. m.

Present: Commissioners Prouty and Cockrell.

Appearances.

Mr. J. N. Teal, for the complainants.

Mr. W. H. Abel, for the intervenors.

Mr. W. W. Cotton and Mr. F. C. Dillard, for the defendants.

Commissioner PROUTY: We will take up the case, No. 1331, Western Oregon Lumber Manufacturers' Association and others against the Southern Pacific Company and others. You appear for all the complainants, do you, Mr. Teal?

101 Mr. TEAL: Yes, sir.

Commissioner PROUTY: Mr. Abel, you appear for the intervening petitioners?

Mr. ABEL: Yes, sir.

Commissioner PROUTY: Mr. Dillard, do you appear for the defendants?

Mr. DILLARD: Mr. Cotton and I.

Commissioner PROUTY: You may proceed.

Opening Statement of J. N. Teal on Behalf of the Complainants.

Mr. TEAL: This is a case, if the Commission please, that is brought by the Western Oregon Lumber Manufacturers' Association and other mill owners in the Willamette Valley in Oregon, whose mills are situated south of Portland, for the restoration of a rate on common, rough green lumber and one or two other articles of lumber to what is known as the San Francisco Bay points. It is a tariff that has been substantially in effect since 1899 from those points. I will explain it in detail in just a moment, because it must be understood in order to know what we are claiming and the position that we take.

102 Now, in this case since it has been brought, there was an intervening petition filed, and on yesterday I stated to the Commission, and the Commission agreed with me, that an intervenor must intervene on one side or the other. We have not the slightest objection, as I stated then, to the granting of the petition of the intervenors, but if this petition of intervention has been filed for the purpose of preventing the granting of the relief prayed for

by the petitioner, and that appears at any time during the trial of this cause, and that it was not filed in good faith for the purposes for which it was alleged it was filed, and if the relief asked is not the relief they propose to put before the Commission, and they want something else, then I shall ask the Commission to dismiss that complaint in intervention. Otherwise I shall be glad to aid them in every way I can.

Commissioner PROUTY: Mr. Teal, the Commission, in acting on these complaints, acts not only for the complainant, but for the whole community. These intervenors are located at Portland.

Mr. TEAL: Yes, sir.

Commissioner PROUTY: They object, as I understand it, 103 to a lower rate from Ashland, for example, than is made from Portland, claiming that water competition at Portland is the excuse for the low rate anyway, and that they are entitled to as low a rate as mills outside of Portland.

Mr. TEAL: In which we quite agree.

Mr. ABEL: That is our position.

Mr. TEAL: If that is the position, there will be no quarrelling in this case. We will see, however, what the position is later on.

Now, originally, in 1898 and 1899 this section of the Willamette Valley (indicating on map), the Oregon and California Railroad running through the Willamette Valley down to Portland, was not a milling section.

Commissioner PROUTY: The Oregon and California Railroad runs from Portland to San Francisco.

Mr. TEAL: I shall refer to the Oregon & California as the Southern Pacific system. It really runs from Portland to Ashland. It is all now the Southern Pacific. Of course we use these local names. It is the Southern Pacific Company—and I do not even know that that 104 is the name of that north line, but it is all the Southern Pacific, only this (indicating) is the Oregon & California line in Oregon.

As I say, in 1898 and prior to 1889, in this valley here there was no lumber production. Its mountains, or much of them, were covered with a very fine growth of timber of not a high quality. That is, the timber is much smaller than the coast timber. It cuts much more common, and it does not grade as high. It is not as good a quality as the coast timber.

Commissioner PROUTY: Is that fir timber, Mr. Teal?

Mr. TEAL: Yes; and there is some pine farther south, but I am speaking now of the fir timber that relates to this case.

At that time Mr. Huntington was in control of this road, and the road was doing but a very little business. If I remember rightly, in those days they ran about one train a day from San Francisco, and possibly a local in the valley, and their freight trains were few and far between. The only mills that were in the Willamette Valley at that time were local mills, sawing for local requirements.

At that same time, to the north here on the Columbia River 105 and at other points there were mills that you heard about in the other case, that were naturally developed on the coast.

where they had water communication. At that time I think I am correct in saying that there were no shipments of lumber by rail out of the Willamette Valley. The question then arose with the railroad people, with Mr. Huntington himself and with those in direct charge of the railroad, how they could create traffic, both local and through, and naturally, in going over the country, the first thing they saw was this unused timbered section, or the timber that was not being sawed.

We will show, as a matter of fact, that these gentlemen who were then in control of the road, for the purpose of creating the traffic, for the purpose of developing business and developing the country—a perfectly laudable purpose, and one for which they should receive full credit—talked with people who will be here before you, who went into the business then, and discussed the situation with them as to how the traffic could be created.

As a matter of fact, around San Francisco Bay and in
103 San Francisco is the primary market on the coast for these common rough grades of lumber.

In discussing this situation, naturally the first thing they had to meet was the rate from the mills on the coast into San Francisco, and it was perfectly inevitable that unless that rate was made, it was utterly impossible that a saw mill could be built.

So that was the commencement and foundation of what we call the 3.10 rate in Oregon. Now, the Commission must understand that this 3.10 rate we refer to—

Commissioner COCKRELL: How much was that; \$3.10 a ton?

Mr. TEAL: \$3.10 a ton; yes, 15½ cents a hundred; and I will state that we do not claim that that is not a low rate. It is a low rate. In fact, I may say it is one of the lowest rates on lumber in the United States, and it was a rate put in, as I state, maintained for the purposes I state, and the railroad company is entitled to full credit for having done it.

Commissioner PROUTY: Let me ask you, Mr. Teal, this question.

Suppose that rate had never been lower than 25 cents a
107 hundred pounds, which is \$5 a ton, would you claim that this Commission today ought to reduce that rate?

Mr. TEAL: No; I don't think I would.

Commissioner PROUTY: That is to say, you do not claim the rate is unreasonable in itself?

Mr. TEAL: No I do not.

Commissioner PROUTY: You put your case entirely on the ground that these people represented to your clients and to other mill men in the Willamette Valley that they would establish this lower rate for the purpose of building up the industry in that valley, that the industry cannot exist there in competition with other sections unless that rate is maintained in effect?

Mr. TEAL: Yes, sir.

Commissioner PROUTY: And therefore the railroad is obliged to maintain it in effect?

Mr. TEAL: It has been maintained for eight or nine years. You have my position exactly, Mr. Commissioner.

Commissioner PROUTY: That simply shows that it has been maintained and industries have grown up; that the railroad company has, during that period, elected to maintain it and found it profitable, probably?

108 Mr. TEAL: You have stated my position exactly. I am not here complaining about the rates being high or low, because it is a low rate.

At that time they had in charge of their rates, or very shortly afterwards, a Mr. Markham, one of the most broad-minded railroad men it has ever been my good fortune to meet. He was constantly, in promoting this industry, doing everything he could to develop the traffic through there, because they absolutely required it, if their statements were true, because this road, assuming this to be true at that time and for some time prior, had constantly shown a deficit. I never quite understood that, but nevertheless that is what their reports did show. The result of these combined reasons that I speak about, was the putting in effect of the rate.

What I want to call the attention of the Commission to at this time is that this \$3.10 rate never applied to any place but San Francisco. All in here and through here (indicating) all outside of this red circle, which I will explain in a moment, was a \$5 rate or higher. The \$3.10 rate was only a rate to enable them to market

this side product, their common rough lumber, although on 109 the start it was made to apply to all lumber.

In this red section here, what is called the \$3.10 scale applies. That is, the rate from these points on a \$3.10 basis to San Francisco plus the local out, until it reached \$5, was applied within that territory. So it might be \$3.85 or \$4.00 within that limited territory, but whatever it was, that is called the \$3.10 scale.

Now, in putting in this rate they originally and always applied a 25 cent differential to the west side of the Willamette River.

Commissioner PROUTY: What is meant by the west side and the east side?

Mr. TEAL: The west side of the Willamette Valley is towards the ocean. I apprehend the reason of that is because at that time they had a longer haul around, to bring it in off this road (indicating) into Portland and get it out again; and probably prior to their acquisition of the Corvallis & Eastern, which is up here (indicating), I imagine they had to allow a differential on that road. That, of course, does not exist today.

Commissioner PROUTY: Where is the main line from Portland? 110 land?

Mr. TEAL: The main line is on the east side of the river.

Commissioner PROUTY: The \$3.10 rate has always applied to all points on the main line?

Mr. TEAL: On the main line, and 25 cents higher to all points on the west side excepting for the brief period that I will tell you about in just a moment.

Commissioner PROUTY: How does the lumber originating on the west side of the river get on to the main line at the present time?

Mr. TEAL: The only way it can get onto the main line is from Corvallis. They can go over on the Corvallis & Eastern to Albany.

Commissioner PROUTY: Is there a line running down the west bank?

Mr. TEAL: Yes; there is a line from Portland to Corvallis, and there is a line running across called the Corvallis & Eastern. So on the west side they would have an additional haul. There is no question about that. I mean they would have an additional haul today, owning the Corvallis & Eastern; but I want to have the case
111 perfectly understood.

When this rate was first put in, it applied to Portland. That was about 1899. I will not speak of all the changes, because it is not necessary. It took in Portland. The \$3.10 flat rate to San Francisco points and the \$3.10 scale all applied to Portland, and to points in the Willamette Valley, with that 25 cent differential I speak of on the west side of the river.

Mr. DILLARD: Pardon me if I correct you there; or would you prefer that I wait until you finish?

Mr. TEAL: No; correct me now.

Mr. DILLARD: I think when that rate was put in, it applied to Portland, Albany, Coburg and Saginaw alone.

Mr. TEAL: That is correct. It was 1899. I did not intend to separate each one. When it was first started it did apply to four points.

Commissioner PROUTY: That was strictly a water competitive rate, was it?

Mr. TEAL: A strictly competitive water rate, and based upon the reasons I have given. In the history of the case I prepared, I have put in every change that occurred in the rate.

112 Commissioner PROUTY: That first rate, then, was not put in to develop the Willamette Valley. That was put in to meet water competition to Portland?

Mr. TEAL: No; Saginaw and these places where the first rate was put in were the first places where the mills started. That is where these men went to start their mills.

Commissioner PROUTY: How far from Portland, for example, is Saginaw?

Mr. TEAL: About 130 miles.

Commissioner PROUTY: South?

Mr. TEAL: South; yes, sir. That is where they went to start the mills. In 1890, the operation of this road was extended down to Drain. That is, it kept working south.

Commissioner PROUTY: How far is that south of Portland?

Mr. TEAL: I should think about 145 miles; maybe 150; and at that time it was placed in operation on the west side of the valley, with this 25 cent differential.

In 1902 the \$3 10 rate territory was extended to Glendale.

113 Commissioner PROUTY: How far is that?

Mr. TEAL: I should think Glendale must be about 285 miles, maybe 275, from Portland; and it was finally extended to the California state line.

Commissioner COCKRELL: What place on the California state line?

Mr. TEAL: They do not give any place; just on the line.

Commissioner COCKRELL: What is the nearest station?

Mr. TEAL: Ashland; but that is really more of a paper rate in there than otherwise.

In August of 1903, this rate was cancelled to Portland, and the rate raised to \$5. On November 1st, 1905, it was raised at Portland to \$7.50. On December 7th that was cancelled again at Portland and reduced to \$5, remaining the same in the Valley during these periods.

Commissioner PROUTY: You mean remaining at \$3.10?

Mr. TEAL: Yes.

On December 7th of that year the rates were extended to the Woodburn Branch, on the east side, commencing here (indicating), limited, however, to points south of Tallman on that branch, and commencing at Salem on the main line.

On January 1st, 1904, all the rates were changed, and there was put in a flat rate of five dollars from all points, Portland included.

Mr. COTTON: That was what year?

Mr. TEAL: January 1st, 1904. That continued until May 10th, 1904, when Mr. Stubbs and some of the officials of the Southern Pacific system came out there and went over the situation themselves in person. The result of the change of that rate was to close the mills in the Willamette Valley. As I say, Mr. Stubbs came out, and other officials, in their private cars, and went all over this situation, with the result that on May 10th, 1904, the rate was reinstated in what we call the Willamette Valley, that is, from Salem south and points on this branch, and points on the west side division, down to Tualatin, very close to Portland.

In that connection, I wish to state that in making these differentials the mills in South Portland had also this 25 cent differential against them. The reason of that was because from South Portland and North Portland, where all the rest of the lines come in, there is no connection, and I assume that differential was made because they have to make a long haul around and quite a long haul to get it back down to the east side down into Portland, and I imagine rather an unprofitable haul.

Now, this rate remained——

Commissioner COCKRELL: What was that last rate?

Mr. TEAL: It was 25 cents higher than the \$3.10. There is one thing at that point that I wish to call to the attention of the Commission. Prior to May 10th, 1904 these rates applied to all lumber. In arriving at a settlement of this proposition and putting it back in, the \$3.10 rate was limited to common rough fir lumber and laths. I think, other rates taking a five dollar rate.

Commissioner PROUTY: Did Portland take the \$3.10 rate on lumber.

Mr. TEAL: Not at that time; no. It was not changed back to them. That rate has continued down until April 18th, of this year. In connection with that, I wish to state that in making the change

116 in this rate in January of this year the companies sent out their notice, giving sixty days' notice, that this tariff was going to be filed and the change made. They afterwards extended that a further period of time.

Mr. COTTON: How much longer did they extend it?

Mr. TEAL: I was going to give the date. So that it did not go into effect until April 18, 1907. As to the time it was given, naturally we do not complain of that, because that was as long as anybody could claim; but as a matter of fact, the car situation was such that even on this extended time it was utterly impossible, apparently, or at any rate they did not furnish the cars to move the lumber that these people had on their other orders. The efforts they made and that sort of thing, I will not dwell upon. I only state as a fact that they did not.

Now we come to the only reason based upon the practice that had prevailed for the change in these rates.

Commissioner PROUTY: Let me — if I understand what the changes have been. You say in the fall of 1903 the rate from Portland was advanced, and as I understand the \$3.10 rate never applied to Portland since then?

117 Mr. TEAL: Never.

Commissioner PROUTY: That rate has always been as high as five dollars?

Mr. TEAL: Since that time; yes, sir.

Commissioner PROUTY: But they did, in the spring of 1904, re-apply this rate to the commerce in the Willamette Valley?

Mr. TEAL: Yes, sir.

Commissioner PROUTY: South of Portland?

Mr. TEAL: Yes, sir.

Commissioner PROUTY: And that rate ran pretty well up to Portland?

Mr. TEAL: Yes; very close to it.

Commissioner PROUTY: It did not include South Portland.

Mr. TEAL: No; it did not include South Portland, but it ran very close to Portland. I will give you some idea of it on the map. Here is Portland where my pencil is now, and there is Tualatin. It ran within ten or twelve miles of Portland.

Commissioner PROUTY: Do you know what the local rate was from Tualatin to Portland?

118 Mr. TEAL: No; I could not say. It would not go that way, anyhow.

Now we come to what was the real reason and what I believe would have justified a temporary advance if they had so desired. The charter rate to Portland, from 1899 up to May of 1906, or probably a little later, had probably not varied on a ton basis half a dollar from \$3 a ton during that entire period. There may have been just a few ups and downs. Then came this tremendous demand for lumber for the San Francisco market, on account of the fire in San Francisco. You all know when the San Francisco fire occurred. Charters immediately jumped, and in January 1907, when this notice was given, charters probably reached the highest point, which was about \$9.50 to \$10. They immediately began to fall thereafter,

until April when this rate went in they were back to about \$6, and by July of this year they were down again to their normal condition.

At that time—and of course it may have produced some results—the Southern Pacific, owing to the fact of their necessities, were compelled to and were shipping very large quantities of lumber by water, and actually paying in money a very much higher price than
119 their rail shipments, owing to this sharp advance at that time.

Commissioner PROUTY: You say the Southern Pacific were shipping lumber. You mean they were shipping lumber required for use on their railroad?

Mr. TEAL: Yes; on their railroad. I simply wanted to give you a view of the situation that existed at that time. The result that followed this advance, as soon as it could be felt, and it was felt almost at once, was precisely the same result that followed in 1904, when the rates were changed, because if they cannot get into the San Francisco market this common rough lumber in competition with these other points, they simply cannot operate in the Willamette Valley.

Commissioner PROUTY: The whole Willamette Valley has the same rate east that Portland has, has it?

Mr. TEAL: Well, it depends on what you mean by east.

Commissioner PROUTY: It has the same rate to Utah territory?

Mr. TEAL: To Utah yes, but not to Idaho.

Commissioner PROUTY: Has it not the same rate to the Missouri River?

120 Mr. TEAL: Yes, sir; but this lumber that goes to San Francisco will not go to the Missouri River.

Commissioner PROUTY: That is owing to the quality of the lumber.

Mr. TEAL: Owing to the quality of the lumber. Of course I do not say that circumstances cannot arise, under extraordinary circumstances, with enormous raises, when that could be done; but I am speaking of the lumber industry as it exists in our country. It cannot go into Idaho.

Mr. ABEL: May I ask you a question Mr. Teal?

Mr. TEAL: Yes.

Mr. ABEL: Is it not a fact that the Willamette Valley mills ship the same grades of lumber east that Portland does?

Mr. TEAL: Yes; I should say they do.

Mr. ABEL: And on the same rates?

Mr. TEAL: Yes; and on the same rates. I am not attacking Portland here. I am not claiming anything against it. So I say unless these rates into this point can be maintained, I think the evidence will show beyond any question that these Valley mills cannot
121 operate, under normal and ordinary conditions.

Commissioner PROUTY: That seems to be your case, Mr. Teal. If they can, there is no reason from your statement, why the rates should be reduced, because you say the rate is low enough, unless those men have been induced to build their mills there, and ought to be protected.

Mr. TEAL: That is correct. I want you to understand, Mr. Commissioner, that I do not claim the Commission has a right to compel the railroad, under ordinary circumstances, to meet water rates or any other competition.

Commissioner PROUTY: You can argue that when you get to the argument of the case. We will get at the facts now.

Mr. TEAL: Yes, sir. I think I have stated the case substantially. Commissioner PROUTY: Let me ask you one more question. Was that rate of \$3.10 applied to San Francisco proper?

Mr. TEAL: Only.

Commissioner PROUTY: Did it not apply to certain other points around San Francisco Bay?

122 Mr. TEAL: Yes; a few points around San Francisco Bay.

Commissioner PROUTY: But to any point outside of San Francisco, there was added to the \$3.10 rate the local?

Mr. TEAL: San Francisco or Bay points.

Commissioner PROUTY: And the local rate from San Francisco to the country points?

Mr. TEAL: Yes.

Mr. DILLARD: With a maximum of five dollars.

Commissioner PROUTY: At the present time, the rate has been made five dollars to all those points?

Mr. TEAL: Yes, sir.

Commissioner PROUTY: That whole country?

Mr. TEAL: Yes, sir, commencing with the California state line. So that on the rate per ton per mile, there is very little in that, because there is only a certain portion that proceeds to a certain point.

Commissioner PROUTY: You may go on with the evidence. Do you desire to make a statement, Mr. Cotton?

Mr. COTTON: I will make a brief statement so that you will understand the issues.

123 Commissioner PROUTY: Very well.

Opening Statement of W. W. Cotton on Behalf of the Defendants.

Mr. COTTON: I understand Mr. Teal takes the position, and therefore we will proceed upon that theory, that this five dollar rate is not an unreasonable rate in and of itself? That is my understanding. Is it yours, Mr. Teal?

Mr. TEAL: Yes, I think I would say that.

Commissioner PROUTY: Mr. Teal says if the five dollar rate had been in effect for the last ten years, he would not ask us to reduce it. It may be they have made a profit. That probably is so; but he does not claim it is an unreasonable rate.

Mr. TEAL: Excuse me a moment on that. The way the Commissioner puts it, I want to make myself clear upon it. I say that the \$3.10 rate is a low rate. I do not say it should necessarily pay a five dollar rate. That is, I do not want to be understood of saying that this rate of five dollars, in and of itself would be reasonable.

Commissioner PROUTY: That was the question I asked
124 you.

Mr. TEAL: I do not say that.

Commissioner PROUTY: I asked you whether, if they had maintained in effect for the last ten years this rate of 25 cents a hundred pounds, you would claim that that was so unreasonable that the Commission ought to reduce it.

Mr. TEAL: Yes; I would claim that that would not be a reasonable rate to all these points.

Commissioner PROUTY: That of course introduces a new issue in the case.

Mr. COTTON: Yes; that is what I want to understand.

Mr. TEAL: That is what I would claim.

Mr. COTTON: If your Honors will refer to the map and take into consideration the country, you will see that the Southern Pacific lines very well supply the Willamette Valley with railroads; that running out of Portland towards the west are two roads that make a loop, one starting from what is called South Portland, and running around in the direction of McMinnville, marked in blacker letters, and then swinging around into Portland again. This line right here was the south Portland line. There never was any physical connection with this line (indicating) running from
125 South Portland to the main line of the Southern Pacific except by running around that loop.

Commissioner PROUTY: How far is it around there?

Mr. COTTON: How far is it around the loop, Mr. Miller?

Mr. MILLER: Something over a hundred miles.

Mr. COTTON: We are now building a cut off, but have not yet completed it, so as to get that traffic over to the other side of the river without running it all the way around. Running out from Portland down to Corvallis on the west side of the river, and in that line, for quite a period of time they had no connection except over the Corvallis and Eastern, and the Harriman people have now bought the Corvallis & Eastern, which extends from the sea, over at Newport or Yaquina over to Albany.

Then they had a line which extends, as you will notice, from Woodburn. That is the extreme east side line. It starts at Woodburn and runs down in the direction of Eugene, where we now have a cutoff, taking it over to the main line again. That is the extreme
126 east side line down here (indicating). This line right in the center is the main line of the Southern Pacific.

Then as you will notice there are a whole lot of little spurs on the west side that run off to various points and places, over to Dallas. You see there is another little loop there running around from the other west side line. In fact, I think Mr. Miles operates a mill at Dallas, and you see that is off on another little branch service.

Then one of Mr. Booth's mills is up on the branch, up here at Wendling, on the east side. That is another little branch line service. You can very well see that all of that country north of Albany is well supplied with railroads, as a matter of fact. In fact,

I do not think all those roads would ever have been built by one company, but they ultimately passed, as the result of foreclosures and bankruptcies, and wiping out, into the hands of the Oregon & California Company. They are not well arranged, and require a large amount of branch line service.

Now, there are no mills to speak about on the main line of the Southern Pacific Company in Oregon. The main line of the
 127 Southern Pacific, to a great extent, runs down through the Willamette Valley proper, a farming country. Mr. Miles has a mill located at Salem, which is on the main line; but most of the mills, and there are how many in number in the state?

Mr. TEAL: We will show that there are several hundred in the Willamette Valley.

Mr. COTTON: There are several hundred little mills scattered around in the Willamette Valley, and they are scattered mainly on these outside branch lines, and their total shipments from these several hundred mills of all kinds of lumber, rough common and good lumber, to the city of San Francisco does not average much more than about 20 cars a day. The entire movement south, not only to these San Francisco Bay points but to Nevada and Southern California, or any point which is reached by the Ashland gate-way, does not amount to over 20 cars a day, and in order to get those 20 cars a day, they have been gathered up from all these branch lines and collected with other commercial freight,—and that is light, because you can well see that in a territory like that with all these branch line railroads, the development is light—and by performing
 128 all of that branch line service and all the collections, as an ultimate result, destined to all points, San Francisco Bay, Sacramento and eastern Nevada, we gather up there in the neighborhood of 20 cars a day, and that is the sum total of the business.

That includes not only this common rough stuff, but all the good lumber which they ship into that territory. We take the position that that rate of five dollars, is, as Mr. Teal I think practically concedes—

Mr. TEAL: No; Mr. Teal does not concede that. Mr. Prouty asked me a question to the effect if the rate had been in effect fourteen years, what I would be here claiming. I do not claim that the five dollar rate is a reasonable rate in and of itself, because the five dollar rate commences from the California state line.

Mr. COTTON: But there is no lumber shipped from the California state line.

Mr. TEAL: We will see where the lumber commences to be shipped.

Mr. COTTON: That is not your quarrel. Your quarrel is up further north. Your quarrel commences up at Coburn.

Mr. TEAL: I have no quarrel with anybody.

129 Mr. COTTON: I mean your kick, the case you are complaining about. I claim that this five dollar rate is a low rate from any point or place in the Willamette Valley where this fir lumber originates and goes to San Francisco. It is not only a reasonable rate, but it is a very low rate.

Commissioner PROUTY: Do you deny, Mr. Cotton, that the rate of \$3.10 was established, as Mr. Teal has set forth, for the purpose of encouraging the construction and operation of these mills?

Mr. COTTON: Yes, sir; the mills were there before the rate was made. All this timber was bought, or a great deal of it—

Mr. TEAL: The facts I think will show who is right about that.

Mr. COTTON: We will go into the facts. This rate was never made as the result of any contract. It never was made as the result of any agreement that it should not be changed. It has been changed, as a matter of fact. It has been changed up and back and up and down again. The \$3.10 rate covers a haul the aggregate 130 volume of business of which is not over 20 cars a day. It involves the performance of all this branch line service, requiring the climbing of the Siskiyou Mountains, over extremely hard grades, a very difficult road to handle. It involves the carriage of the freight down through Cow Creek Canyon, which washes out periodically, and where the Southern Pacific, as you can see from the evidence, has had to move first to one side and then to the other, to find a place where it could rest comfortably for a while. It is a humpy country, and the \$3.10 rate never was in any sense of the word, compensatory. The distance from San Francisco to Portland is how many miles?

Mr. TEAL: 771.

Mr. MILLER: It is 746.

Commissioner COCKRELL: How far is it from Ashland down?

Mr. TEAL: 431 miles.

Mr. COTTON: 431 miles. There is, however, little or no lumber that originates, I may say, in the vicinity of Ashland. The lumber commences farther north, as Mr. Teal said, at Coburg and Albany and Eugene. That is where the fir is.

Mr. TEAL: I think probably 650 miles on the main line 131 would be a fair average haul.

Mr. COTTON: Yes; 650 miles on the main line, at \$3.10, over a very mountainous country, extremely hard to operate, 20 cars a day, with all this branch line service, and some three hundred odd miles to gather up 20 cars a day, is the sum total of the business. I simply say that that rate is not a reasonable rate—the five dollar rate.

Mr. DILLARD: There is another point you might call attention to at the same time, which is that the great excess of tonnage is south bound.

Mr. COTTON: I was coming to that. I would not care if the traffic was balanced. If you were even trying to even it up for \$3.10, I would not call \$3.10 a reasonable rate under those circumstances, or a compensatory rate, and I would not call five dollars a reasonable rate, certainly not an unreasonable rate, taking the freight per ton per mile which this road has necessarily got to get in order to sustain itself. It has been a road, as Mr. Teal says, that has always been down 132 by the heel. It is not a good road.

Mr. TEAL: I said it had, prior to this time. I did not say what its earnings had been since the rate went in.

Mr. COTTON: And I do not believe in this whole entire section any one man can say that outside of the main line there is any volume of traffic. There are lots of those branches that operate with one mixed train a day, as you can see from the volume of the lumber traffic we get off of it, and others with one or two passenger trains, at the outside, and on that Corvallis line we run a passenger train through a day, and I guess one freight train more than does the business. On this Woodburn line, the Willamette Valley line that runs around from South Portland, part of the line is gone. The bridge has not been put back there for two years, has it Mr. Booth?

Mr. BOOTH: I do not know Mr. Cotton. That is north of our operations.

Mr. COTTON: And altogether there is nothing in the business even at five dollars.

In addition to that, we are transporting empty cars practically for all of this lumber movement to San Francisco. The reason
133 for that is this. The lumber schooners go down from Portland with loads and there are other vessels going down with loads, because the products of Oregon largely go to California, and as a result of that those schooners go down there and the steamers operating from Portland to San Francisco go down with loads and bring merchandise back. As a result, there is practically no merchandise movement into the Willamette Valley from San Francisco. The competition by ocean, owing to the loading of the lumber schooners and the loading of the regular steamships with potatoes and stuff which originates in the Willamette Valley, is largely south bound. The result is finally that it would appear that for every lumber car that goes south, we practically haul an empty one north. There is one hundred and seventy-four feet maximum grade over the Siskiyou Mountains. We have got to get this stuff from Ashland to the summit, besides other humps and dips all the way through.

I do not think the 316 mills that were operating in the Willamette Valley, which are the complainants in this case, ever went into
134 business on a \$3.10 rate or on any representation that that should continue, because the evidence will show that, on the contrary, it was up and down and up and down again.

Opening Statement of W. H. Abel on Behalf of the Intervenor.

Mr. ABEL: If the Commission please, there are one or two facts which I would like to bring to the attention of the Commission on behalf of the intervenors.

Portland produces one-tenth of all the lumber manufactured in the states of Oregon and Washington east or west of the Cascades. The annual output for last year was 643,000,000. The production of lumber in the Willamette Valley is not nearly one-half the Portland production. The \$3.10 rate as originally established was for the benefit of Portland and applied only to Portland. A number of the Portland mills were built in reliance upon the continuance of the \$3.10 rate.

Commissioner PROUTY: It was only in effect three or four years from Portland?

Mr. ABEL: Yes; that is very true. We shall show that the application of the five dollar rate resulted in a sharp decline in
135 the price of lumber and a considerable loss of profit to the Portland lumber men. About one-third of the Eastern & Western Lumber Company output was shipped from Portland to San Francisco and Bay points on the \$3.10 rate, the capacity of the output of the Eastern & Western Lumber Company being one hundred million per annum.

Commissioner COCKRELL: You mean shipped by rail?

Mr. ABEL: Shipped by rail. The magnitude of the Portland interests involved here is actually greater than those of the upper Willamette Valley people.

Mr. COTTON: There is one other thing I want to call your Honors' attention to that I omitted, and that I regard as a very important fact to take into consideration in this situation.

The Willamette Valley mills ship twice as much lumber east via Portland as they do south via Ashland. That is, the same mills that are engaged in this—

Mr. TEAL: So as to be perfectly fair about this Mr. Cotton, which I know you want to be, do you refer to 1906 and 1907?

Mr. COTTON: 1906, our figures are.

136 Mr. DILLARD: 1906, during the California movement.

Mr. TEAL: At the time this car shortage occurred in the Willamette Valley, when you could not even ship your own? I just wanted the Commission to understand when these figures were made up.

Mr. COTTON: We will make them up for any year.

Mr. TEAL: I am going to see if my request has been granted, presently. It will show it.

Mr. COTTON: Now, we make from all that territory a blanket rate. We charge nothing on that eastern lumber shipped from Ashland up to the east. It might well be said that each man is entitled to the advantage of his position. I would concede that, provided he could say that he was being charged an unreasonable rate, it would be your Honors' duty to reduce the rate to Albany, irrespective of what you might think, from a traffic standpoint, would be most advantageous to the railroads and to the people; but if that rate is not unreasonable in itself, then I think you should take into consideration the entire situation, which is this, that if graded rates were made out of that territory both ways, the substantial result would be that the southern mills, for instance Coburg and Eugene would sell
137 to the south and their product would go south. The Portland mills would sell to the east as against these extreme southern mills. Then there would be mills situated at Newburg and Salem, half way in between Portland and Eugene, that would pay a higher rate than Portland to the east, and a higher rate to San Francisco than Eugene; and all that section of the Willamette Valley, in my opinion, would be entirely cut out from any business, either east or west, because they would be so situated that they could

not compete to the south on a graded basis of rates as against the Eugene, Coburg and Wendling mills, and they could not compete to the east as against the Portland mills. I simply refer to that for the reason that graded rates—or, to put my proposition to you again, I think it is your Honors' duty to reduce these rates if they are unreasonable in themselves, but it is not your duty to reduce them if they are not unreasonable in themselves, simply because of the proximity of Eugene to the California territory, in view of the fact that Eugene enjoys a very substantial advantage as a result of having a blanket the other way.

Commissioner PROUTY: I presume the mills themselves would prefer a blanket in all directions. Mr. Teal, there does not seem
138 to be much dispute about the questions in this case. The mills have a rate to the south, and one question is to what extent they are dependent upon that rate for their continued existence. They have a rate to the east. For what reason is not that rate as valuable to them as it is to Portland and other mills, and to what extent is it necessary that this rate should be maintained to San Francisco in order to fairly continue the prosperity of these establishments?

Mr. TEAL: That is where I intend to confine my testimony.

Mr. DILLARD: In order that we may get it in the record,—I do not know that it will be necessary at all—I desire at this time to interpose a special exception and objection to the introduction of any testimony on that line, on the grounds that if the rate is reasonable, the railway company has the right to make it, irrespective of what might be the effect of it; second, that there can be no estoppel upon a railroad from making a reasonable rate, irrespective even of the fact, if it were a fact, that a contract had been entered into that the rate would not be changed; that the matter of making rates must be determined by the conditions as they exist at any given time
139 by the law then in force; that any contract, if there were a contract theretofore made, could have no effect, and that the evidence proposed to be introduced is in all respects irrelevant and immaterial. I presume, of course, the evidence will be admitted, but I want to make the objection at this time in this way, that I may not seem to be interrupting the counsel.

Commissioner PROUTY: The evidence will all be received subject to the objection of Mr. Dillard. Of course in over-ruling the objection and receiving the evidence the Commission expresses no opinion upon the question involved, but that evidence seems to be pertinent to Mr. Teal's claim.

Mr. DILLARD: Yes, sir; I understand.

Commissioner PROUTY: You may proceed, Mr. Teal.

Testimony on Behalf of the Complainants.

LEW ANDERSON, a witness produced on behalf of the complainants, being duly sworn, testified as follows:

Mr. TEAL: Mr. Anderson, what is your occupation?

140 Mr. ANDERSON: I am engaged with the Oregon & Washington Lumber Manufacturers' Association as rate clerk.

Mr. TEAL: Have you had a large experience in the matter of examining rates and tariffs?

Mr. ANDERSON: I have been engaged in that work in one way and another for a dozen years or so.

Mr. TEAL: Have you prepared a history of the rate on lumber from various points on the Southern Pacific Company lines in Oregon to various points in California covering this controversy?

Mr. ANDERSON: I have prepared such a statement.

Mr. TEAL: From the tariffs on file with the Interstate Commerce Commission?

Mr. ANDERSON: From the tariffs with the Interstate Commerce Commission.

Mr. TEAL: Is this a correct statement of that?

Mr. ANDERSON: Yes, sir; this is the statement I prepared, and it has been very carefully gone over by me.

Mr. TEAL: It shows the history of the rates from what year?

Mr. ANDERSON: From the year 1899.

141 Mr. TEAL: To when?

Mr. ANDERSON: To the present time.

Mr. TEAL: I would like to offer that as "Anderson Exhibit 1."

Commissioner PROUTY: That may be marked as "Exhibit 1," and will be admitted.

(The paper referred to was received in evidence and marked "Anderson Exhibit 1.")

Mr. TEAL: Mr. Anderson, did you prepare that map?

Mr. ANDERSON: That is my work.

Mr. TEAL: From the tariffs?

Mr. ANDERSON: From the tariffs; yes, sir.

Mr. TEAL: And the key on the side there substantially explains the situation, does it not?

Mr. ANDERSON: That is a full explanation of the colorings and letters.

Mr. TEAL: I will not take the time—

Commissioner PROUTY: That may also be admitted. Do you desire it marked as an exhibit?

Mr. TEAL: Yes; as Exhibit 2.

(The map referred to was received in evidence and marked "Anderson Exhibit 2.")

142 Commissioner PROUTY: The other side should be furnished with a copy of the statement of Mr. Anderson, because they desire to check up those rates.

Mr. TEAL: I have one here. We can use it together.

Mr. COTTON: We will borrow the exhibit during the noon hour and check it up, your Honor.

Mr. TEAL: That is all I wish to ask Mr. Anderson.

Mr. COTTON: I will not cross examine Mr. Anderson.

Commissioner PROUTY: You are excused, Mr. Anderson, but you will remain here so that the defendants may cross examine you during the day, if they desire.

R. A. BOOTH, a witness produced on behalf of the complainants, being duly sworn, testified as follows:

Mr. TEAL: Where do you reside, Mr. Booth?

Mr. BOOTH: At Eugene, Oregon.

Mr. TEAL: State your occupation, and what it has been for a number of years past.

Mr. BOOTH: I have been engaged in the lumbering business principally for a good many years. I am interested in lumber plants at this time.

143 Mr. TEAL: Where?

Mr. BOOTH: In Lane County, Oregon, with the Booth-Kelly Lumber Company.

Mr. TEAL: Is that the Willamette Valley District?

Mr. BOOTH: In the upper Willamette Valley district.

Commissioner PROUTY: By the "upper," you mean what?

Mr. BOOTH: The southern.

Mr. TEAL: The river runs north, so we call it up out there.

Commissioner PROUTY: Yes.

Mr. TEAL: You are reasonably familiar with the conditions surrounding the lumber industry in the Willamette Valley are you not, Mr. Booth?

Mr. BOOTH: I am.

Mr. TEAL: How many mills have you built there?

Mr. BOOTH: Four.

Mr. TEAL: And what is their capacity?

Mr. BOOTH: Well, thirty thousand or more feet per hour. I think it is rather more than thirty thousand.

Mr. TEAL: What was your output in 1906 of these mills?

144 Mr. BOOTH: Do you mean the amount shipped or the total amount?

Mr. TEAL: I would like to know what the cut was and what was shipped. I will get through this pretty fast.

Mr. BOOTH: I think we disposed of about 82,000,000 feet. We shipped 79,000,000.

Mr. TEAL: About 3900 car loads in 1906?

Mr. BOOTH: I will have that in a moment.

Mr. COTTON: You shipped about how much?

Mr. BOOTH: In 1906, 79,000,000 plus. We disposed of 82,123,196 feet.

Mr. TEAL: About how many car loads, Mr. Booth?

Mr. BOOTH: I have that in car loads. 3900 cars in 1906.

Mr. TEAL: Can you state how many car loads you have shipped in 1907?

Mr. BOOTH: For the first ten months, 2248.

Mr. TEAL: What are the shipping facilities for your mills?

Mr. BOOTH: The lines of the Southern Pacific Company.

Mr. TEAL: You have no water facilities at all?

145 Mr. BOOTH: No water.

Mr. TEAL: Where is the output of your mills sold, Mr. Booth, or where has it been sold for the last few years principally?

Mr. BOOTH: I have it here in car loads from 1901 to and including the first ten months of this year.

Mr. TEAL: I wish you would just read that in the record.

Mr. BOOTH: In 1901, shipped east, three hundred and sixty-eight cars; south, thirty-four hundred and thirty-eight.

In 1902, twelve hundred and ninety-five east; thirty-two hundred and thirty-one south.

In 1903, eight hundred and thirty-one east, twenty-four hundred and forty south.

In 1904 six hundred and seventy-one east, twenty-six hundred and seventy-six south.

In 1905, thirteen hundred and twenty-five east, two thousand and eighty-three south.

In 1906, sixteen hundred and seventy-five east, twenty-two hundred and twenty-five south.

In the first ten months of 1907, eleven hundred and twenty-nine east, eleven hundred and nineteen south.

146 Mr. TEAL: What was the cause of the falling off of your southern shipments there, Mr. Booth, if you know?

Mr. BOOTH: Lack of transportation facilities.

Mr. TEAL: You had the orders, did you not, for that section?

Mr. BOOTH: Yes, sir.

Mr. TEAL: Mr. Booth, has your company gone to any expense in maintaining an office in San Francisco for the sale of lumber?

Mr. BOOTH: Yes, sir.

Mr. TEAL: You have maintained one there regularly in the past, have you not?

Mr. BOOTH: Not during all the time, but during the past several years?

Commissioner PROUTY: Can you tell me what part of your lumber shipped south has gone on the \$3.10 rate and what part has paid a higher rate?

Mr. BOOTH: No, sir; I can't tell that exactly.

Commissioner PROUTY: Can you give an approximation?

Mr. BOOTH: From 15 to 20 per cent. has gone on the \$3.10 rate.

Our shipments have at times been about equal in each direction. If the statement is correct that seven thousand cars have been shipped south, then we alone have shipped a little in excess of the entire amount that has gone south.

Commissioner PROUTY: I mean of your southern shipments, what part has gone on the \$3.10 rate. You say 15 to 20 per cent.?

Mr. BOOTH: I mean of the whole.

Commissioner PROUTY: Of your shipments south, what part has gone on the \$3.10 rate and what part on a higher rate?

Mr. DILLARD: Do you mean of the present year, your Honor?

Commissioner PROUTY: No; take the periods covered by his statement.

Mr. BOOTH: I cannot say definitely, because I have not that information. I will simply have to estimate.

Mr. TEAL: What would be your estimate, Mr. Booth?

Mr. BOOTH: I think between 15 and 20 per cent. Perhaps 15

per cent. of it, I would say. No; I beg your pardon. You asked—

Commissioner PROUTY: For your southern shipments?

148 Mr. TEAL: What part of your shipments into California took the \$3.10 rate?

Mr. BOOTH: Yes; I understand what you mean. I will say half of it.

Commissioner PROUTY: What part of it has ever paid the \$5 rate?

Mr. BOOTH: The remaining half.

Mr. TEAL: It could not be that.

Mr. BOOTH: No; the other points we reach in California. Of course part of our shipments to the Bay points where the \$3.10 rate applies on a certain class of lumber, are also \$5, which in effect has made the average rate we pay to that point \$3.68. We ship to other points in California where the rate is from \$5 to say \$8.75 per ton. Would that answer the question?

Commissioner PROUTY: At the present time the rates upon all grades of lumber to San Francisco Bay are \$5, as I understand it?

Mr. BOOTH: Yes, sir.

Commissioner PROUTY: There is no higher rate on the higher grade of lumber?

149 Mr. BOOTH: Not now. There was a higher rate when the \$3.10 was re-established.

Commissioner PROUTY: So this advance applies really to something over one-half of the lumber that you ship south?

Mr. BOOTH: Approximately one-half. That is my judgment now.

Commissioner PROUTY: The balance would not be affected at all by the advance?

Mr. BOOTH: Well, I don't know what influence there might be, of course. The base rate shipping from other points not far removed—

Commissioner PROUTY: That is my question exactly. It seems in the past you had a rate of \$3.10 to San Francisco.

Mr. BOOTH: And that was the basic rate.

Commissioner PROUTY: That was the base rate. When you shipped out from San Francisco, you paid the local out until you reached a point which came to \$5.

Mr. BOOTH: That is right.

Commissioner PROUTY: Now, Mr. Teal stated that at the present time the \$5 rate applied to all that territory, so that you pay
150 no local out from San Francisco. In other words, if you take the most distant point which you could previously reach at a \$5 rate, you reach that point now for \$5?

Mr. BOOTH: Yes, sir.

Commissioner PROUTY: You so understand it?

Mr. BOOTH: Yes, sir; but our position is this, that if the \$3.10 rate is restored to us, it will be restored as a basing rate. That is our position.

Commissioner PROUTY: I understand, but what I am trying to get at is just how much of your shipments this advance affects, and I judge by your answer that it affects about one-half of your shipments south.

Mr. BOOTH: I think that is approximately true.

Mr. TEAL: Now Mr. Booth, you were closely connected were you not with the development of the lumber business in the Willamette Valley?

Mr. BOOTH: I think we were the first, and so far as I know we were the first, of the interior mills to do an interstate business. Prior to 1898——

Commissioner PROUTY: When did you go into the Willamette Valley Mr. Booth?

151 Mr. BOOTH: We looked over the situation first in July 1896. We commenced work in 1897, in the localities where we now are.

Mr. TEAL: Prior to the understanding which you will hereafter relate in reference to this rate, and prior to the putting in effect of this rate, what was the condition of the lumber industry in the Willamette Valley, if there was any there? Just state the facts.

Mr. BOOTH: It was merely, I think, wholly for local consumption. There was no interstate business. There were no shipments out. There was very little business done. The population then was very much less than now, and the local demand was less than now.

Mr. TEAL: The mills that were in the valley then were simply in the Willamette Valley proper, and not affected by this rate. They were simply engaged in filling local requirements, were they not?

Mr. BOOTH: Yes, sir.

Commissioner PROUTY: When was this blanket rate to the east first put in, Mr. Booth?

Mr. BOOTH: I don't think I can answer that.

Commissioner PROUTY: Does anybody know when the Portland rate was extended south to the Willamette Valley?

152 Mr. COTTON: In 1901, by way of Portland, after the Hariman merger.

Mr. BOOTH: Of course prior to that time, your Honor we had rates into Ogden and Salt Lake and the Colorado territory via Sacramento.

Mr. TEAL: What became of those rates?

Mr. BOOTH: We are not allowed to ship that way now. Our shipments go by Portland.

Mr. TEAL: We will refer to that later to show how this territory has been cut off. Now, will you please give the history of the development of the lumber business there in the Willamette Valley, Mr. Booth? Commence right at the beginning of it and state what it was.

Mr. BOOTH: So far as it relates to our sales—and I would prefer to confine it to that unless I am asked other questions—prior to the time named, I and others who are now associated with me were operating in the southern part of the state, in soft pine lumber, located at Grant's Pass.

In 1896 Mr. J. I. Jones brought us a letter of introduction from the railroad people, asking us to look over his plant; that he
153 was then attempting to operate or getting ready to operate at Saginaw. We declined at first to look the plant over, but upon a second similar request we looked into the proposition, and after doing so we conferred with the purchasing agent in Oregon and

the manager of the Oregon line, and finally made a lease of what is known as the Saginaw plant for 12 months for the purpose of seeing what we could do in the way of handling fir, going into the market and learning its quality and what might be done with it. We eventually, and about a year later, purchased that plant. We became convinced that the fir product was a good commercial product in lumber, and desired to increase our operations.

Mr. TEAL: Excuse me right there. Prior to that time this Willamette Valley fir was not considered a very substantial asset as a commercial product, was it?

Mr. BOOTH: No, sir; it was not. We had not operated in fir prior to that, and hence knew very little about it. We were cautioned at first by the railroad people—

Mr. TEAL: Who?

Mr. BOOTH: Mr. Coler.

154 Mr. TEAL: Who was he?

Mr. BOOTH: He was the manager of the Oregon line—saying that we perhaps could not reach a very extended market with the product, but they were anxious to know what it was; that it was good tie material for certain square timbers for the use of railroad construction, but he doubted whether it would go into commercial uses, where the better grades were used. It had been their practice to confine their purchases of the high grade material very
155 largely to Puget Sound and points north; but, believing that it was a fair competitor, grade for grade, we desired to increase our operations, and we went again to the railroad company, both in Oregon and in San Francisco.

Mr. TEAL: This was then controlled from San Francisco. It was then a Huntington line, was it not?

Mr. BOOTH: It was then a Huntington line. Mr. C. P. Huntington was the main force. Receiving encouragement, we leased then in 1898 the Coburg mill, with the privilege of buying within 12 months' time. We took over the option. That gave us a greater output and a further test. The business seemed to be desirable to us and to the railroad company, and, desiring to further extend our operations, we then increased our capital very materially, for the purpose of purchasing the timber body.

Mr. TEAL: At this time, in 1898, what was said about the rate?

Mr. BOOTH: It was being discussed then as to whether we would be permitted to go into the California Bay points on the competitive basis with water. We have volumes of letters on that, bearing
156 that date, and we had numerous interviews, myself and other members of our company; and it was understood as early as 1898 that it would be a satisfactory rate, and that it would eventually be given.

We then entered into negotiations for a body of timber about, say, 20 miles from the ocean on the main line, on the Mohawk basin. In doing that, the railroad people said to us that they would not sell us the timber unless we would agree to manufacture it; that they had not considered up to that time that their timber was very much of an

asset, and that it was the tonnage that they desired, and not the purchase price of the timber. They gave us several illustrations.

Mr. DILLARD: If your Honor please,—all right; go ahead. I was going to suggest that you gave the names of the people who made that statement.

Mr. TEAL: We can give the names. Give the names, Mr. Booth, of those you were talking to.

Mr. BOOTH: Later I will, and maybe it will be a little more specific.

Mr. TEAL: Go ahead and tell all the facts about it.

Mr. BOOTH: They gave us several instances as to how their
157 business was affected in this way, instances where timber had been sold for \$20 an acre and the freight charges had been more than \$2,000. We negotiated with them for a body of timber, with Mr. William H. Mills, who was the land agent and a director. It was he who made the statement first——

Mr. TEAL: A director of what?

Mr. BOOTH: Of the Southern Pacific Company. It was he who made the statement first that they would not sell us the timber without an agreement or understanding that we would manufacture; that it was their purpose to develop that territory in all ways that they could.

To be brief in the statement, he introduced us to Mr. C. P. Huntington. We had an understanding with him as to the quantity of timber, the location and the price, but the contract was not entered into with us until another agreement was also reached as to what the rates would be, and where the mills should be located, and the construction of a road from the Woodburn-Natron Branch to the plant we desired to locate, at a place later called Wendling, which was at the margin of the timber body to which I refer.

158 These agreements or understandings were made simultaneously.

Mr. COTTON: Were they in writing or not?

Mr. BOOTH: They were covered by a letter. We had no written contracts with them.

Mr. COTTON: Have you the letter?

Mr. BOOTH: I have not.

Mr. COTTON: Have you got it in your files?

Mr. BOOTH: I have it, I think, at home.

Mr. COTTON: All right; we would like to have a copy of it sent to the Commission.

Mr. BOOTH: The letter refers to the amount of business—I can give you substantially what the letter is. I think, however, that your Company have it also, because I have seen the letter in their hands since. The letter refers to the construction of this road and the amount of business that we would give them. We agreed to aid in the construction of the road to the extent of furnishing the ties and the right of way and to ship over the line, of forest products, during the first year, not less than 2500 cars, and to pay a local charge of 50 cents per thousand feet; that thereafter the market and other con-

ditions should govern what we did as to the rates. In connection with that, this branch was built—

159 Mr. COTTON: I would like to have it understood that a copy of that letter is to be sent to the Commission by Mr. Booth.

Mr. TEAL: You have asked for it, and it will be done. You have one yourself. There is very little trouble about getting it.

Commissioner PROUTY: You can furnish a copy, can you, Mr. Booth?

Mr. BOOTH: I think I can. I will very cheerfully furnish anything the Commission desires.

Mr. TEAL: Anything we have, the Commission can have. This Wendling branch is one that Mr. Cotton referred to in his opening.

Mr. BOOTH: Yes sir.

Mr. TEAL: You did build the mill there?

Mr. BOOTH: We did.

Mr. TEAL: You did furnish the right of way?

Mr. BOOTH: We did.

Mr. TEAL: You did furnish the ties?

Mr. BOOTH: We did.

Mr. TEAL: You did pay the extra amount for shipping over the branch at that time?

160 Mr. BOOTH: There was some contention about that rate it was discussed at some length with the people at Portland, the local officials who stated they intended to make it a 50 cents per ton instead of a 50 cents per thousand feet rate. The result was that a 40 cent per ton rate was put in, which means about 40 cents on certain grades, and say 65 as a maximum. We substantially complied with that. Of course the rate was a little more than we had intended, but there is no complaint of that.

Mr. TEAL: Over that branch you paid this local, did you not?

Mr. BOOTH: We did.

Mr. TEAL: And have, all the time?

Mr. BOOTH: No sir, the rate has been reduced on that to 25 cents a ton.

Mr. TEAL: But you paid a local over that branch?

Mr. BOOTH: Yes sir; at all times.

Mr. TEAL: In addition to the regular rate?

Mr. BOOTH: Yes sir.

Mr. TEAL: Just go on now, Mr. Booth.

Mr. BOOTH: We later increased our output by building a mill at Springfield. We intended, after that was done, to make an additional increase and to concentrate our operations to some extent, and we bought a site at Harrisburg, below the junction of the principal prongs of the Willamette Valley.

161 Mr. TEAL: Was the \$3.10 rate put in that we were talking about?

Mr. BOOTH: Yes sir.

Mr. TEAL: That was in 1889, was it?

Mr. BOOTH: That is my recollection.

Mr. TEAL: That explains why it was applied first to Wendling and Saginaw and these places. How many places did it apply to in the Willamette Valley?

Mr. BOOTH: It applied first on the main line to Saginaw, and after we commenced operating the Coburg mill, which is on another line, and what was then a branch line, but which has since been connected at a point south of the main line, it was applied to Coburg and as we developed the other shipping points, it was in turn applied to them.

Mr. TEAL: Just go on, Mr. Booth.

Mr. BOOTH: We increased our output, as shown by the figures that have been presented. At times we have had a good
162 deal of trouble. In fact, nearly all of the while, with car shortage. The discussion of that has brought us in contact with the superior officers of the company a number of times.

I want to say this, however, as to our markets earlier. We had what was considered, and was, I think, in fact, an extremely low cost line in our earlier years. Our relation was extremely cordial with the Southern Pacific people, as far as we would comply we sought the markets that they desired.

Early they asked us to develop a trade in Arizona, in the mining business, that was then competitive with the Santa Fe. A large amount of our early business went into that territory on, say, an \$11 per ton rate. We continued to cultivate that territory until the rate was withdrawn, in the general adjustment of the traffic situation, and rates were established more to the satisfaction of the lumber men and the Southern California people.

We were then asked to develop a business in the mining regions of interior California, known as the mother lode country, and we were given special rates to that territory. I mean we had low
163 rates for the purpose of developing a trade there as against the local product that gave no rail haul. We had a very extensive business in there in proportion to our output, and in proportion to the amount that went into that territory, until the business was well advertised to all of our competitors and the rate was gradually extended. We have some business there still.

We were told repeatedly, after the rates were so adjusted, that it was desirable to their people that our eastern business should go via Portland; that they preferred that that territory should be developed because of their ability to place cars better because they could draw large supplies from connecting interstate lines; I mean lines that were interested in getting the tonnage, and that, in addition to their own equipment, would enable them to better accommodate us. That we did, and have continued to do, and it accounts to some extent for our increased eastern shipments.

Now, about the disturbing of the rates. They were taken off, and when they were first taken out, that caused——

Mr. TEAL: What rate was that?

164 Mr. BOOTH: The \$3.10 rate.

Mr. TEAL: What date: January 1st, 1903 or 1904, was it?

Mr. BOOTH: I think that is the time.

Mr. TEAL: 1904.

Commissioner PROUTY: In the fall of 1903?

Mr. BOOTH: Yes; it was taken out January 1st, is my memoran-

dum. That caused a practical shut down of our business, and quite a good deal of discussion about this.

Commissioner COCKRELL: What was that rate?

Mr. BOOTH: \$3.10. It was when the \$3.10 rate was taken out.

Commissioner COCKRELL: What rate was put in?

Mr. BOOTH: \$5, and I think for a time—well, \$5 was our rate.

Mr. TEAL: Prior to that time this \$3.10 applied to all lumber, did it not?

Mr. BOOTH: It applied to all lumber.

Mr. TEAL: I want the Commission to understand that—prior to January 1st.

Mr. BOOTH: All lumber that was shipped to Bay points.

165 Mr. TEAL: Now, just go on, Mr. Booth. You were speaking about the effect of this change.

Mr. BOOTH: It caused a shut down of our mills, and others, and quite an accumulation of material that we had to work off—gradually; and after testing it as well as I could, I represented to our directors that it would put us out of business, and it would be necessary for us to either quit operating entirely or perhaps confine our operations to one mill.

Our President, Mr. Buck, took the matter up actively with the San Francisco officials, with Mr. Sproll, and Mr. Stubbs, and considerable correspondence followed, and finally a visit of those gentlemen, accompanied by Mr. Coleman, who handled the matters in Oregon, to the Willamette Valley. They visited our plants, I think all of them. They were practically shut down, as I have stated, and quite a long conference followed.

Mr. Stubbs position was this. He said that at all times it was his view that it was a bad thing to put in the rate, in the first place; that the Oregon lumber on their lines should have waited until the forests at other places were more nearly depleted, so that the lum-

166 ber to the various points might furnish a better freight rate and enrich the state more, because the stumpage would be worth more; but that inasmuch as the rate had been put in and the business developed on it, he supposed they were in for the rate, but that he wanted to make such adjustments of it as he could that would be satisfactory to the lumber men, and give the best results to them. He wanted to know if it would be satisfactory if this should apply only to green common rough lumber, and after defining what that should apply to and what the term should mean, that there should be no misunderstanding about it, he stated that it would; that all the higher grades of lumber should take a higher rate, and that the common lumber, if dried, should take a higher rate.

He asked us if we would agree if the rate was maintained to continuously operate our mills, and referred especially to the one at Wendling, that was then shut down. At that time we were in the Wendling mill. I told him we would undertake to do so. He said he would reestablish the rate, and later he did.

Mr. TEAL: On May 10, 1904 the rate was put back in?

Mr. BOOTH: Yes sir.

167 Mr. TEAL: Just go on and tell it from then on down.

Mr. BOOTH: Of course we opened all our mills and continued the operations and developed them, as shown by the amounts that have been shipped. I presumed, and so reported to our directors, that that would fix for all time the rate; at least while the present conditions prevailed, and I suggested that we undertake the increasing of our output as originally contemplated by the purchase of the property at Harrisburg.

After a time, there was talk of withdrawing this. I mean some years afterwards, in the early part of the present year. The only conference I had with reference to the \$3.10 rate since that was after it was generally understood that the rate was to be taken out. Mr. Lounsbury, the traveling freight agent—I am not sure that that is his title, but he travels from the freight department, and at that time was under the direction of Mr. Coleman—came to our office in June and stated he wanted to discuss the matter, that he had been requested to do so by Mr. Coleman. He said there appeared to be

168 no longer any justification of the \$3.10 rate, because the tonnage rates were very much higher than they were at the time it was put in.

Mr. TEAL: You mean the charter rates?

Mr. BOOTH: The charter rates. I said to him that we would be perfectly willing to follow the charter rates, if that was what they intended. I asked him if it was, but he said—

Commissioner COCKRELL: You mean the charter rates by water?

Mr. BOOTH: By water, from Portland. You understand, the \$3.10 rate, while we are not located on water, our competitors are mills that are on water for the San Francisco trade. That was the basis of this rate being made for us. I had a little talk with him. I told him the effect it had on us before, and he simply said that they had decided to withdraw the \$3.10 rate and put in the \$5 rate. I said to him "Then if it is a thing that is definitely settled, there is no use to waste our time in discussing it," and he withdrew.

Mr. TEAL: And this rate was put in finally, and made effective on April 18, 1907?

169 Mr. BOOTH: That is correct.

Mr. TEAL: I wish you would state to the Commission what effect the change of this rate to San Francisco and Bay points has upon your business and others similarly situated in the Willamette Valley, and the reason I would like to have the Commission understand that is because it is a local situation, and is rather peculiar.

Mr. BOOTH: If we were doing a very little business, a small business, the rate would not make any great difference, so far as the community was concerned. The development of the lumber business affects the entire community. Do you want me to refer now to the community or our business?

Mr. TEAL: I want the effect on the lumber business. What I wanted the Commission to understand was why the change of this rate into the San Francisco Bay points affects the lumber business, and how it affects it.

Mr. BOOTH: I stated before, I believed our lumber was a fair competitor for other fair lumber, grade for grade. I mean by that a common stick of our lumber is as good as a common stick of our competitors' lumber, and the same is true of high grade lumber, flooring and intermediate grades; but the percentage of the high grade lumber that we get or that can be obtained, so far as any demonstration is concerned that has already been made, is very much less than that of the Columbia River or other points north. For instance, 70 per cent. of our lumber, or more, is merchantable, or No. 1 common grade, which is generally used interchangeably, and of grades of less value. The San Francisco and California markets have used two grades of lumber in the common, one No. 1 common, and the other No. 2 common, and of course we conform to that.

Commissioner PROUTY: Mr. Poulsen testified that of his cut at Portland, about 70 per cent. was common, as I remember it. Do you understand that his grades are the same as yours?

Mr. BOOTH: Mr. Poulsen, I understand, has a less percentage of commons than the average mills of Portland.

Mr. TEAL: You mean a less percentage of even grades?

Mr. BOOTH: A less percentage of even grades.

Mr. TEAL: That is the fact?

Mr. BOOTH: That is my understanding.

Commissioner PROUTY: Proceed, Mr. Booth.

171 Mr. BOOTH: Interior California takes a high grade of common lumber, and has at all times during my experience in the lumber business. San Francisco takes a low grade of common lumber, and it is to that point, almost wholly, with the exception of certain traffic in mining timbers that we have shipped our No. 2 common lumber. More than half of our common lumber is No. 2, but, to be conservative, say half of our No. 2 common lumber, and it is must find that or a kindred market. It cannot go into any other.

Mr. TEAL: Is there any other market for it that you know of?

Mr. BOOTH: There is no other market that we can reach except as I say, some of it is put into mining timber, and we have been compelled to send some of it in that way to markets that were not remunerative, but that must be done, of course, to run the business.

Commissioner PROUTY: What can you afford to sell that No. 2 common for at your mill?

Mr. BOOTH: The average cost of our lumber last year, which was the highest of any year, was \$8.94, exclusive of fixed charges, which made the total \$9.97.

172 Mr. COTTON: You mean \$10.97, including depreciation, interest, insurance and all those items. You said \$9.97. You are \$1 shy.

Mr. BOOTH: Yes sir.

Commissioner PROUTY: But that does not include stumpage?

Mr. BOOTH: That includes stumpage.

Mr. TEAL: 50 cents.

Mr. BOOTH: We charge our stumpage at 50 cents. We have done

that up to the present time. Nearly three fourths of our lumber, 70 per cent. or more, is of the common grades. We must get cost out of it. If we do not get cost out of it there will be no profit of any consequence. Do you desire to know the range of prices at which it has been sold?

Commissioner PROUTY: Yes.

Mr. BOOTH: Shall I submit a memorandum of prices showing the prices at which it has been sold?

Commissioner PROUTY: Yes; you might do that.

Mr. DILLARD: If it is short, read it into the record.

Mr. TEAL: Is this No. 1 common or No. 2 common, Mr. Booth?

Let us know when you read the prices.

173 Mr. BOOTH: If you want to refer to the prices generally, it includes a number of different kinds of material we had here. I think I can give you the facts, though, so that it will be satisfactory.

Mr. COTTON: Let him make a statement and have it copied into the record.

Mr. TEAL: No; let Mr. Booth state it if he can.

Mr. BOOTH: I remember that when we commenced we had to assume contracts that were taken for even \$5 and \$6 per thousand feet. It was a small plant, situated in the timber, under favorable conditions, and we commenced in 1897 selling lumber at \$6 and \$6.50 as the lowest price for our lumber. That furnished us a profit at that time, but the cost has increased, as shown by my testimony.

Mr. TEAL: Could you give us some idea of what the prices of common lumber would be at the mills, during 1905, 1906 and 1907. 1906 and 1907 are hardly years to go by in the lumber business.

Mr. BOOTH: I can give the prices at which we sold ties, for instance, or at which we sold other items in 1905. We sold ties for \$8.50.

174 Mr. TEAL: I would like to ask you there if the common lumber does not sell for less than the ties,—No. 2 common?

Mr. BOOTH: The tie is made up from No. 1 and No. 2 common lumber. Of course the No. 2 grade is the lowest grade of lumber we handle, except that which is inferior, and might be classed as culls; but I haven't any price to show—

Commissioner PROUTY: I do not think it is worth while to spend much time on these prices. Mr. Booth testifies that he needs this San Francisco market in which to dispose of his No. 2 common lumber. Now, the other side may interrogate him on cross examination.

Mr. TEAL: Yes. I simply wanted to bring out also from Mr. Booth that without that market there would be a certain effect on his operations. I do not care to go into detail. I simply want him to state the ultimate facts, and they can examine him on that; only I want the Commission to understand the condition there, and what has always been the effect.

Mr. BOOTH: I can answer that better by what it has been.
175 It shut us down before. There is no question about that. When the rate was changed this time we had to fill some

orders that were taken on the old rate, and by reason of that we made a loss of between \$800 and \$900, but we were successful in getting the most of our orders that were placed on that cancelled, a quantity of more than 11,000,000 feet.

Mr. TEAL: That is, after this rate was changed you had succeeded in having cancelled orders amounting to 11,000,000 feet?

Mr. BOOTH: At the time the rate was changed, we had orders for more than 11,000,000, that we succeeded in getting cancelled, some at our solicitation and some where they were bought on f. o. b. mill arbitrarily by the purchaser. Some of them of course were not, and we had to make good.

Mr. TEAL: Those orders could have been filled at a profit if the rate had been continued and you had been furnished cars, could them not?

Mr. BOOTH: They were desirable.

Mr. TEAL: What is the difference per thousand feet on this \$3.10 and \$5. rate.

Mr. BOOTH: The \$3.10 rate is approximately \$5.25. The 176 \$5 rate is \$8.33. The \$3.10 rate is \$5.17, to be exact.

Commissioner PROUTY: The \$3.10 is equivalent to \$5.17?

Mr. BOOTH: \$5.17 per thousand feet, and the \$5 rate \$8.33.

Commissioner PROUTY: Does that apply on rough lumber or on your entire cut?

Mr. BOOTH: Under what conditions do you mean did it apply?

Commissioner PROUTY: I understand the rate only applied on rough lumber.

Mr. BOOTH: Under the readjustment of things, it applied only to green common lumber.

Commissioner PROUTY: And the differences you state are the differences as applied to that kind of lumber?

Mr. BOOTH: That is right.

Commissioner COCKRELL: \$5 would amount to how much per thousand?

Mr. BOOTH: \$8.33 on green common lumber.

Mr. TEAL: In other words, on the very lowest class of 177 products you produce, the advance was over 60 per cent., was it not?

Mr. BOOTH: Yes sir.

Mr. TEAL: Ties are made up of what are supposed to be common lumber, are they not?

Mr. BOOTH: They are made of common lumber.

Mr. TEAL: When this rate was first put into effect, was it supposed to apply to ties or not?

Mr. BOOTH: Yes sir; and it did apply to them. It was made to apply to them. That was the practice, but later there was a distinction made. We discovered that last year.

Mr. TEAL: How did you happen to discover it?

Mr. BOOTH: Well, we had sold quite large quantities of lumber to San Francisco people, the Western Pacific.

Mr. TEAL: The Western Pacific Railroad?

Mr. BOOTH: The Western Pacific Railroad. After we had shipped

a large quantity of them, we found out that they would not apply this rate to ties. They made a distinction, and we lost quite heavily by that.

Mr. TEAL: So as a matter of fact the rate simply is limited closely to this common rough green lumber that goes to the San Francisco market, and the laths, I guess it is.

Mr. BOOTH: That is right.

Mr. TEAL: What was the effect at the mill yards upon the shipment of this rough common lumber that otherwise would have gone to San Francisco. Did you have to pile up any lumber, or do anything about that, that otherwise would have gone?

Mr. BOOTH: Of course it would be hard for me to distinguish the difference between the effect of the \$3.10 rate and the lack of cars. We have now, say, 35,000,000 feet of lumber piled up on our yard. If that rate had not been taken off and an adequate supply of cars had been furnished, we would have had no more than the normal, which is about half that amount. In other words, I mean to say that we had orders upon which we could have moved it and would have moved it if the rate had not been disturbed and the cars had been furnished. Of course the effect is that we not only have the lumber on hand, but it is depreciating in value, and we will have very material losses.

Mr. TEAL: The mills in the Valley cannot get into Idaho with this lumber at all, can they?

179 Mr. BOOTH: They cannot.

Mr. TEAL: So that as to this common grade that goes to San Francisco, they cannot ship it to Colorado and Utah?

Mr. BOOTH: No sir; not the No. 2 lumber. I say, we have forced some of it into that market, and will continue to do so to some extent, no doubt, but it is of little consequence and would not make the volume that we have.

Mr. TEAL: Of course I suppose you could put a price that would move it some way or other?

Mr. BOOTH: Well, the demand for it is very much less there than it is in the other markets. They do not call for that class. I don't mean they would not take it at some price, but at no price that we could afford.

Mr. TEAL: Since that rate has gone into effect, will you state to the Commission what orders you have received from San Francisco for lumber of those grades?

Mr. BOOTH: None, I think, at all. I think we have moved possibly half a dozen carloads, but practically nothing. It has had the effect of shutting us out, absolutely.

180 Mr. TEAL: So that it simply closes that market to you?

Mr. BOOTH: It does.

Mr. TEAL: And it is that rate that does it, Mr. Booth? You are prepared to state that to the Commission?

Mr. BOOTH: I am.

Mr. TEAL: Now, can you give the range of charters during this period to the Commission, from say Portland?

Mr. BOOTH: At the time of the discussion of the \$3.10 rate first with us, the charters were \$4.

Mr. TEAL: Per thousand feet, you mean, do you not?

Mr. BOOTH: Per thousand feet, the charters were based on.

Mr. TEAL: I would ask the Commission to keep that distinction in mind, because when we speak of charters, we are speaking of a thousand feet, 3300 pounds.

Commissioner PROUTY: Does the charter take the lumber on the dock?

Mr. TEAL: Mr. Buehner can answer that.

181 Commissioner PROUTY: Never mind. Proceed.

Mr. BOOTH: That at times has been as low as \$3.50. Whether it has been lower or not, I don't know. It reached the highest point after the San Francisco disaster, in May, I think. The highest I have any knowledge of was \$9.50.

Mr. TEAL: That was about January, 1907, was it not?

Mr. BOOTH: I think the highest point was possibly at that time, and a little later it ran lower.

Mr. TEAL: Then what was the course of the charters?

Mr. BOOTH: They were downward, rapidly, until now they are \$4.25 to \$4.75. That is my understanding.

Mr. TEAL: Back to the original amount, or about the original amount?

Mr. BOOTH: About.

Mr. TEAL: In the Willamette Valley proper, I wish you would state to the Commission what the direct result of the establishment of this industry was in the development of business, and its character in the Willamette Valley, from your own knowledge.

182 Mr. BOOTH: Well, take our territory. I think our territory, perhaps, has been stimulated more than the average, because the product of our mills, perhaps is greater than any other one interior point. Our business centers around Eugene. That is the county seat of Lane county. It is a town that would be affected very materially by the lumber business, because it is surrounded on three sides by forests. When we commenced, the population was supposed to be 2800, say 3,000. It is two and a half times that now. It receives the full impulse, and is directly benefited by our operations. Our pay rolls are met at that point, very largely.

Springfield is three miles from Eugene. That is where our last mill was built. At the time that mill was built there were, say, half a dozen families there, maybe a hundred people. I don't think in excess of that. It has 1500 now. The growth has been on account almost wholly, if not entirely so, to the erection of a large plant there. Wendling is in the edge of the forest. It is the terminus of the branch line to which reference has been made. There was one family there when we commenced operation, from whom we purchased some land for a mill site. We have restricted the
183 growth of that town in some ways, but there have been from 250 to 400 people there, and it requires that number. That number will be there when our plant is in operation.

Coburg, another point where we are operating has now from 800

to a thousand people, I think, and perhaps had between 100 and 200 when we commenced operating. There was no waystation or anything of that sort at Saginaw when we commenced there. There is quite a little community both there and at the mill on the mountains, five miles from there. It has not only given employment to the people who work, of course, but it has stimulated the market for the products of the farms; so that the communities are very much more prosperous than they were then, much more prosperous than they have been at any time in their history of which I have any knowledge, and I have been there all my life.

Mr. TEAL: The business of the railroads has apparently developed, by the number of trains they have run, has it not?

184 Mr. BOOTH: My recollection is that at the time we commenced, there was one through train each way to San Francisco, and a local train as far as Roseburg in Oregon. Since that they have had three trains each way, and some locals, I think two locals. One of the through trains is now made a local train again, about which there is some agitation in our state. The freight trains were irregular, not even daily, two or three times a week. There are many now.

Commissioner PROUTY: I do not think, Mr. Teal, we will spend much time in showing the effect of this industry upon the community. If these mills have been located there and cannot exist without this rate you would not add anything to your case by showing that the community is also benefitted by the mills?

Mr. TEAL: Very well. On this Wendling branch, since you located there, have there been any other mills located on the Wendling branch?

Mr. BOOTH: Nine other mills, three of the Southern Pacific Company, and six others.

Commissioner PROUTY: You should show the extent to which this lumber industry has developed, but I do not think it is necessary for you to show the extent to which the county has developed.

185 Commissioner COCKRELL: You spoke about the Southern Pacific. Were the mills established by the Southern Pacific Railway?

Mr. BOOTH: Yes sir; they have recently built and are operating their own mills on this branch, to which reference was made, to supply themselves with lumber.

Commissioner COCKRELL: For their own use?

Mr. BOOTH: Yes sir. I understand this was for their own use, and I presume it is.

Mr. TEAL: Generally speaking, Mr. Booth, can you state whether or not, from the beginning you speak of, the lumber industry has now spread all over the Willamette Valley, substantially, from Glendale to Newberg?

Mr. BOOTH: These rates have been extended to reach all points. I suppose that is the best answer to that. It has been done at the request of the mills, and it is done quite a good deal in the Umpqua District. It has extended the operations all over the Willamette Valley.

Commissioner PROUTY: Do you know the number of mills that operate in that valley?

Mr. BOOTH: I am not positive. It would only be hearsay.

186 Mr. TEAL: We will show that after a while, Mr. Commissioner.

Commissioner PROUTY: Proceed.

Mr. TEAL: Mr. Booth, suppose this lumber that goes south to San Francisco—Glendale is about the southern edge of it, is it not?

Mr. BOOTH: Glendale is the southern edge of it; that is my understanding; yes sir.

Mr. TEAL: That is, from Ashland?

Mr. BOOTH: There is none in the Rogue River Country. That is a soft pine product. That is not affected.

Mr. TEAL: I want to be clear about that rate in there south of Glendale. It would shorten the haul, but there is nothing moves on it. I think that is all. Mr. Booth is entirely familiar with this original matter, and he can answer anything the Commission desires to know in connection with it.

Commissioner PROUTY: You may cross examine, Mr. Cotton.

187 Cross-examination:

Mr. COTTON: Have you the statement of prices, Mr. Booth, that you get for your lumber from year to year?

Mr. BOOTH: Yes sir.

Mr. COTTON: May I have it, please?

Mr. BOOTH: Yes sir.

Mr. COTTON: I would like to offer that in evidence, and have it introduced to show the prices that they receive for lumber at various periods from 1901 to 1906. Just let it be copied into the record.

The statement referred to was received in evidence, marked "Exhibit Booth Cross Ex. No. 1," and is as follows:

TABLE NO. 3—Showing the Comparative Price of Lumber for the Past Seven Years, as Shown by the Records of The Booth-Kelly Lumber Co.

Customer.	Order.	Date.	Year.	Ties.
S. P. Co.....	32030	11/6-06	1907	Sls. 13.50
C. & N. W.....	P-67278	8/7-07		
188 S. P. Co.....	12544	5/17-06		
C. & N. W.....	P-11165	11/3-05	1906	Sls. 9.55
S. P. Co.....	H-453	5/29-05		
C. & N. W.....	P-92961	3/31-05	1905	Sls. 8.50
S. P. Co.....	H-193	3/11-05		
S. P. Co.....	H-267	5/2-04		
S. P. Co.....	H-419	7/23-04	1904	Ro. 8.50
S. P. Co.....	H-201	5/19-04		
S. P. Co.....	H-407	8/25-04		
S. P. Co.....	H-576	4/24-03		
C. & N. W.....	P-46238	12/5-02	1903	Sls. 970.
S. P. Co.....	H-1810	12/30-02		
S. P. Co.....	H-831	6/17-02	1902	Sls. 8.00
C. & N. W.....	P-32216	3/28-02		
S. P. Co.....	B.L.-1864	7/1-01		
S. P. Co.....	H-860	8/23-01	1901	Ro. 7.00
S. P. Co.....	H-853	8/23-01		
S. P. Co.....	H-278	3/20-01		

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Timbers.	String.	Ro. fram.	Ro. sills.	36 to 40
13.50	16.50	21.00	23.000	
8.50	9.50	18.00	21.00	
7.25	7.75	15.00	16.00	
8.00	8.50	15.00	15.00	
8.50	9.50	16.00	16.00	
8.00	10.00	14.00	15.00	
7.50	8.50	12.00	12.00	

Mr. TEAL: I desire to object now, and let it go in, because I do not think the price of lumber has anything to do with it.

Commissioner PROUTY: You spent lots of time with matters that have nothing to do with these cases, then, Mr. Teal, in the last few days.

190 Mr. TEAL: I think so too.

Mr. COTTON: Did the Southern Pacific sell you any land?

Mr. BOOTH: Yes sir; the O. & C.

Mr. COTTON: The same company that owns this road?

Mr. BOOTH: Yes sir.

Mr. COTTON: It was sold through the Southern Pacific Officials; that is, these same people with whom you talked about your negotiations?

Mr. BOOTH: Yes sir.

Mr. COTTON: And that land was sold upon the Mohawk, near Wendling?

Mr. BOOTH: And other points in Lane County.

191 Mr. COTTON: How many acres did you buy?

Mr. BOOTH: The first considerable contract was tributary to the Mohawk, seventeen thousand and some odd acres.

Mr. COTTON: Seventeen thousand acres?

Mr. BOOTH: Seventeen thousand plus; yes, sir.

Mr. COTTON: What else did you buy?

Mr. BOOTH: From them?

Mr. COTTON: Yes.

Mr. BOOTH: There have been no other large contracts directly from them. We have bought in a small way quite a number of places. The total amount I could not say. I can give you the total acreage we have, and about its relation.

Mr. COTTON: No; the amount that you——

Mr. BOOTH: I couldn't say how much we purchased from them, Mr. Cotton.

Mr. COTTON: Can you not approximate in a general way, what you bought from the Southern Pacific Company at any time?

Mr. BOOTH: The substantial amounts in excess of what I have said have come from other parties. Do you want me to include them?

192 Mr. COTTON: No; just your own direct purchases from the Southern Pacific Company.

Commissioner PROUTY: You say very little except the seventeen thousand acres?

Mr. BOOTH: No; I say there have been no other large contracts directly from them, but we have purchased through others and had the assignments of contracts of their lands.

Commissioner PROUTY: He asks you for purchases from the Southern Pacific Company.

Mr. BOOTH: Directly.

Commissioner PROUTY: Now, aside from the seventeen thousand acres, have there been considerable purchases?

Mr. BOOTH: There has been quite a good deal, in a small way. How much, I don't know, but I will gladly furnish it to the Commission.

Commissioner PROUTY: Would it be one thousand acres?

Mr. BOOTH: Yes; several thousand. I should say fifty per cent.

193 This is a mere guess, but I would say ten thousand acres that have come directly; but it may — more.

Commissioner PROUTY: How much timber land do you own?

Mr. BOOTH: By the way, with your permission, Mr. Commissioner, I want to correct a statement I made the other day—a statement I made as to our timber lands, when I was not expected to make that, and I gave what was in my mind. It referred to other lands which we own, that were not timber lands, and that have since been disposed of. We own now 147,000 acres of timber land, and of that twenty odd thousand have been cut over.

Commissioner PROUTY: Have you purchased all that land since you had this talk with the Southern Pacific Company about rates?

Mr. BOOTH: We have, substantially. There were a few hundred acres involved in the first lease we made, but only a few hundred acres.

Mr. COTTON: You have purchased the larger part of this since 1904, have you not? When did you buy the land grant land?

Mr. BOOTH: In 1902, in September.

194 Mr. COTTON: How much was that purchase; how many thousand acres?

Mr. BOOTH: Do you refer now to the land we have?

Mr. COTTON: No; the land grant, the wagon road company.

Mr. BOOTH: In round numbers, 105,000 acres—the Booth-Kelly Company. I want to say in that connection, in order that Mr. Cotton may understand it, that the company purchased the lands that were within the Cascade forest reserve, and of that in timber land there was thirty odd thousand acres, which is the whole amount of it that we now have.

Mr. COTTON: This seventeen thousand acres that you bought from the Southern Pacific Company was bought when in what year?

Mr. BOOTH: It was bought in 1899 I believe Mr. Cotton.

Mr. COTTON: You contracted to buy it when; in that year?

Mr. BOOTH: That is what I refer to. I don't refer to the date of the conveyance. It was bought on a five year contract

195 Mr. COTTON: You selected this land, this seventeen thousand acres, out of how large a reservation that was set aside for your benefit to select from?

Mr. BOOTH: There was no reservation set aside for us. We purchased substantially all within the basis in which we operated which was Mill Creek operation, or better designated as the Mohawk Basin. It overlapped, to some extent, towards the McKenzie River. We desired to make selections and throw out a lot we took but it was not permitted, and we took substantially all of it. There were some few hundred acres that were added to it later.

Mr. COTTON: You had five years in which to pay for that.

Mr. BOOTH: Yes.

Mr. COTTON: Did you pay for it in installments or did you pay for it all at the end of the five years?

Mr. BOOTH: The contract was this, that we were to pay for it in five years, to pay the interest annually in advance, at seven per cent.—

Commissioner PROUTY: I do not think, Mr. Cotton, you should take time to go into that.

Mr. COTTON: I would like to show exactly what this timber cost him.

196 Mr. BOOTH: Shall I proceed?

Mr. TEAL: I am perfectly willing.

Commissioner PROUTY: If the Southern Pacific gave it to him, you may show that, but if he made a good trade, I do not think it is necessary to go into it.

Mr. TEAL: I think it is what they were selling their lands for, but it is all right.

Commissioner PROUTY: Of course in deciding these questions, we can only consider the general aspect. We do not consider a particular contract with a private individual. For example, in this case the fact that this man bought seventeen thousand acres of land from the Southern Pacific Company would not have any influence on my mind—whether he bought it from them or somebody else.

Mr. COTTON: What does this timber cost you?

Mr. BOOTH: Seven dollars per acre.

Mr. COTTON: And what will it scale per thousand feet?

Mr. BOOTH: It was estimated at the time we purchased it, thirty thousand to the acre.

Mr. COTTON: Thirty thousand to the acre?

Mr. BOOTH: Yes, sir.

197 Mr. COTTON: And how much will it actually cut now?

Mr. BOOTH: Some of it has cut under that. Some of it has cut over. If the market conditions improve as they have, or if the market conditions should remain as they have been recently, it would exceed that by ten to twelve and one-half per cent.

Commissioner PROUTY: You can take the timber off closer.

Mr. BOOTH: Exactly; we cut more of the trees and cut the trees closer.

Mr. COTTON: As you have been cutting, has it averaged thirty thousand feet to the acre, or more?

Mr. BOOTH: Both more and less.

Mr. COTTON: I mean as an average proposition.

Mr. BOOTH: I think it has probably gone over it, anywhere from five to twelve and one-half per cent.

Mr. COTTON: That is, in the actual cut?

Mr. BOOTH: That is what I referred to.

Mr. COTTON: So it actually cuts five to twelve and one-half per cent more than thirty thousand feet to the acre?

198 Mr. BOOTH: I would say that is the average, though quite a good deal of it has cut less.

Commissioner PROUTY: We listened in the other cases to a great deal of testimony about contracts prior to the operations of the mills. I do not think we will take time in this case to do that. We will get at the general situation here. We will not get a history of what this gentleman has made on any particular purchase of land.

Mr. COTTON: But that is the whole basis of his claim.

Commissioner PROUTY: Oh, no; the whole basis of his claim is that you have put in a rate and he built his mill on the strength of that rate, and is entitled to his rate. If he made a good trade, he is entitled to that.

Mr. COTTON: If we show that his timber cost him about 20 cents, I think that is important as to what he can sell for as against the Portland mills. It would strike me so.

Commissioner PROUTY: I think you would have a right to show in a general way what his stumpagè cost him.

Mr. COTTON: That is the reason I am getting at this, over 199 the scale. Mr. Booth, what disadvantages does Portland labor under in shipping south as against you—that is, against the Booth-Kelly Lumber Company?

Mr. BOOTH: In what particular, Mr. Cotton?

Mr. COTTON: Are you not familiar with any of the disadvantages which the cargo shipper experiences in shipping south to San Francisco Bay points and points in the interior of California.

Mr. BOOTH: If you will refer to anything specifically, I might be, but I don't recall anything. Of course I am speaking now of the shipping facilities. Do you mean that?

Mr. COTTON: I mean the advantages in selling and disposing of their lumber, the cargo shippers?

Mr. BOOTH: They have this advantage of us. They can take advantage of the shipping by water when the cars are not furnished.

Mr. COTTON: I was talking about the disadvantages.

Mr. BOOTH: Oh, I beg your pardon.

Mr. COTTON: Do you know of any disadvantages that the Portland cargo shipper labors under?

Mr. BOOTH: None occur to me now. I have my mind on 200 the shipping. Of course we produce lower than they do if that is what you refer to in the manufacture. That is to say, we produce less than was stated in some of the testimony that was given here.

Mr. COTTON: Your dry lumber goes where?

Mr. BOOTH: South and east.

Mr. COTTON: Your first class lumber goes south as well as east?

Mr. BOOTH: Yes, sir.

Mr. COTTON: Do you get the same prices down south for your dry lumber that the Portland mills do?

Mr. BOOTH: We aim to get the same price, grade for grade, of all kinds that they do.

Mr. COTTON: Do you get the same price east?

Mr. BOOTH: We mean to. I presume we do.

Mr. COTTON: And you get the same price for your common?

Mr. BOOTH: Grade for grade, as far as I know, we mean to, we should.

Mr. COTTON: Your logs in Wendling are situated close to the mill?

Mr. BOOTH: We are logging about five and a half miles now.

201 Mr. COTTON: And that is all covered in this cost of 1906?

Mr. BOOTH: Yes, sir. Of course we did not buy all those

lands of the railroad company, understand. We bought the alternate odd sections from them, but it is all within that district.

Mr. COTTON: And the timber you bought from other people did not cost you any more?

Mr. BOOTH: I can give you prices, if you desire.

Mr. TEAL: Please give them.

Commissioner PROUTY: Oh, no; state generally.

Mr. BOOTH: The prices we paid are the prices I gave. We bought some single claims a trifle less, for \$25 an acre.

Commissioner PROUTY: You charge fifty cents stumpage in your estimate of cost?

Mr. BOOTH: Yes, sir; uniformly, up to this time.

Commissioner PROUTY: Has your stumpage cost you half that?

Mr. BOOTH: I can give you the exact cost for certain years, or we can give you the average cost, if you desire.

202 Commissioner PROUTY: What do you consider the average cost?

Mr. BOOTH: Twenty-eight cents.

Commissioner PROUTY: Do all lumber men in your section generally own their own timber?

Mr. BOOTH: Yes, sir.

Commissioner PROUTY: So that logs are not sold to the mill as they are on Puget Sound?

Mr. BOOTH: No, sir; it would be absolutely impossible for us—

Commissioner PROUTY: There is no current price for stumpage there, or is there?

Mr. BOOTH: Well, stumpage now during the past year—the highest price we have paid is \$1.25. We have frequently paid \$1, where we can get it for the purpose of operating.

Commissioner PROUTY: It depends on its location?

Mr. BOOTH: Surely, and where we can use it in our present operations. We would not of course pay that if it was remote and held for an investment, but the people who are operating there now who do not own their timber, and they are only small people, are
203 paying from \$1 to \$1.50 a thousand.

Commissioner PROUTY: Proceed, Mr. Cotton.

Mr. COTTON: Mr. Booth, you cut and sold common lumber for \$6.50, and made a profit?

Mr. BOOTH: From our Saginaw mill we did; yes, sir, the first year we operated.

Mr. COTTON: That was in what year?

Mr. BOOTH: 1897.

Mr. COTTON: About how much profit was there in producing common lumber at \$6.50?

Mr. BOOTH: Assuming now that it was all common, do you want to know our cost line at that time?

Mr. COTTON: Yes, your cost line.

Mr. BOOTH: Well, say \$5 at the Saginaw mill in 1897.

Mr. COTTON: And this 1906 cost—

Mr. BOOTH: Is an average cost of all the mills.

Mr. COTTON: Now, that 1906 cost is about how much above nor-

mal? What do you think the normal price would be? I do not regard \$6.50 as normal now, of course.

204 Mr. BOOTH: I have a memorandum here showing the increase in the various items that enter into the cost as compared with those years, Mr. Cotton.

Mr. COTTON: What would be your cost for five years?

Mr. BOOTH: An average cost for the past five years?

Mr. COTTON: Yes; for the past five years per thousand feet.

Mr. BOOTH: I haven't that.

Mr. COTTON: Would you say it exceeds \$7.50?

Mr. BOOTH: Including fixed charges?

Mr. COTTON: Yes.

Mr. BOOTH: I would say it would be between seven and eight dollars. Probably eight dollars would be about right.

Mr. COTTON: That includes your fixed charges and everything?

Mr. BOOTH: Except the stumpage; yes, sir. I want to say, in that connection, that at all of our mills we commence the logging, of course, at the nearest possible point. For instance, we have done our logging for less than two dollars, where now it costs us five dollars, and the cost has gradually increased. Another thing: We operate our logging altogether with the exception of Saginaw by streams, and we have taken the lumber that was near the streams and floated it to the mills, which are located tributary.

Commissioner PROUTY: How do you get your lumber to the streams?

Mr. BOOTH: By steam, the same process as is common to all the lumbermen there, and the time for that has practically disappeared. We are now surveying for railroads, and we will have to confine our operations very largely to railroads after this.

Commissioner PROUTY: How far can you haul it by steam?

Mr. BOOTH: Well, indefinitely, of course.

Commissioner PROUTY: I mean profitably.

Mr. BOOTH: The farthest we have hauled has been say two and one-half miles. That means the use of a yarder and two road machines. The road machines haul from half a mile to a mile, but I would say that it would be better practice to have a railroad if you are to haul more than one mile.

Mr. COTTON: At the time this \$3.10 contract was made, how much did you agree to cut a year, if any?

206 Mr. BOOTH: What \$3.10 contract?

Mr. COTTON: I thought you were relying on some understanding—

Mr. BOOTH: Oh, the understanding?

Mr. COTTON: Yes.

Mr. BOOTH: We were cutting then about forty thousand feet a day at Saginaw. I mean a day of ten hours, a single shift; about 65,000 at Coburg; and we agreed to cut or to ship of the forest products from the Wendling mill the first year 2500 minimum car loads, which at that time was 10,000 feet.

Mr. COTTON: That is, did you agree to that, or state that you would do it, that you thought you would do it?

Mr. BOOTH: The letter says, "We agree to." I mean as to Wendling. The letter referred solely to Wendling. The other mills had been constructed. We bought them and enlarged them and improved them, but the letter referred solely to the Wendling plant. It says "We agree to." That is my recollection.

Mr. COTTON: There was not anything said about rates in that—as to what rates would be charged you?

207 Mr. BOOTH: Not in the letter. That was understood, though, before we purchased. As I said a while ago—in fact, it would be a repetition to say—our contract was not given until we had made the arrangement for the road and agreed to construct the mill.

Mr. COTTON: And that contract undertook to state the whole understanding between the parties?

Mr. BOOTH: I don't want read into my testimony that there was a written contract, but a definite understanding.

Mr. DILLARD: I understood you to say before that you had a letter agreeing to put these rates in. That was my understanding.

Mr. BOOTH: I didn't say it. I said that was first settled. It was on that understanding that we did what we did, but the letter referred to the construction of the road, the part we should contribute, the size of the mill that we should build, and the amount of lumber we should ship the first year.

Mr. COTTON: And there was no writing whatever agreeing as to the rate?

Mr. BOOTH: None whatever, except as it may have been referred to in various letters.

208 Mr. COTTON: Nor as to its continuance or anything about it?

Mr. BOOTH: Nothing further than what I have stated.

Commissioner PROUTY: I do not understand that there is any claim on the part of these complainants that there was any contract for this rate.

Mr. TEAL: No, sir; we have never made such a claim.

Mr. DILLARD: I understood him to say he had a letter covering it. It was my misunderstanding.

Mr. BOOTH: I don't think I said it. It is not correct.

Mr. DILLARD: It was probably my misunderstanding entirely.

Mr. COTTON: Was it your understanding that this \$3.10 rate was to continue forever?

Mr. BOOTH: Well, that is a long time.

Mr. COTTON: Well, for an indefinite period?

Mr. BOOTH: Yes, sir; for an indefinite period; that it should continue indefinitely. That is a good way to put it.

Mr. COTTON: As long as your timber lasted you were to get a \$3.10 rate?

209 Mr. BOOTH: I would not include that in an indefinite statement; no. I should think it would be fair—do you want

me to interpret that—during the life of the operation of the mills that were built on that, but not necessarily to cover all our timber.

Mr. COTTON: You only built one mill on that.

Mr. BOOTH: We built three mills on that, practically. We rebuilt the Coburg mill, Mr. Cotton.

Mr. COTTON: When?

Mr. BOOTH: The year after we purchased it, just at the time we commenced in 1899.

Mr. COTTON: That rate was necessary to enable you to compete with people that had water transportation?

Mr. BOOTH: It was absolutely necessary. I say that unqualifiedly.

Mr. COTTON: It was based on the water rate?

Mr. BOOTH: It was.

Commissioner PROUTY: If conditions so changed that the water rate was advanced, would there have been inequity in the advance of your rate by the railroad company?

Mr. BOOTH: Certainly there would. We would be perfectly content to follow the water rate.

210 Commissioner PROUTY: So that really you did not expect that rate to last forever, but as long as conditions were the same?

Mr. BOOTH: That was the basis of it, so stated in all our talks and correspondence. That was the basis of the rate making with this exception, that our rate was a trifle higher, and would have remained so, because there is some advantage in shipping smaller quantities in car loads.

Commissioner PROUTY: You understand the water rate is a trifle higher than it was when this rate was put into effect, do you not?

Mr. BOOTH: Yes, sir; it is from 25 to 75 cents higher at this time.

Commissioner PROUTY: A thousand feet?

Mr. BOOTH: Yes, sir; a thousand feet; but it is less than our rate—less than our rate would be if we had the \$3.10 rate, not the five dollar rate.

Mr. COTTON: Did they say or give you to believe that they would follow the water rate?

Mr. BOOTH: I don't recall that anything was ever said about following the water rate.

Mr. COTTON: There was nothing said about that?

211 Mr. BOOTH: I said following it. It was stated it was put in to meet the water rate—so stated in our conversations and in our correspondence. The language that was used when the rate was re-established, which we understood was to be permanent, was that we would undertake to operate our mills if the rate was restored on the \$3.10 basis. That is the language of Mr. Stubbs.

Mr. COTTON: Did Mr. Stubbs at that time tell you it would continue for any length of time?

Mr. BOOTH: I can repeat what I said. He said that if this matter had been left to him originally, he would not have put in the rate. He thought it was wrong for the railroad, because later they could get more for it, and it would enrich the holders if they would hold it, but inasmuch as it had been put in and the moral obligation ex-

isted, he said they were in for it. That was his statement, and he did this—I do not want to volunteer anything, Mr. Cotton, but simply to say this—

Mr. COTTON: That is all right.

Mr. BOOTH: In order that you may know there is no misunderstanding. That there might be no misunderstanding as to the term green common lumber and as to what we should undertake
212 to do, he put it in writing.

Mr. COTTON: The grades of lumber you manufacture and sell are about the same as those manufactured and sold by Mr. Poulsen?

Mr. BOOTH: I couldn't answer that. All I know is that I judge from his testimony we have about the same amount of common lumber. As to the grades and qualities I couldn't say.

Mr. COTTON: And grade for grade it will run just about the same.

Mr. BOOTH: I think a No. 1 board of ours is as good as a No. 1 board of his.

Mr. COTTON: Do you think some of the other mills in Portland run higher; if so which ones?

Mr. BOOTH: The Eastern & Western run a very much higher percentage of clears, according to Mr. Buehner's statement to me and also Mr. Ayres and Mr. Ransom.

Mr. COTTON: The more clears there are, the more profit?

Mr. BOOTH: Yes, sir.

Mr. COTTON: Is there any disadvantage in selling lumber in San Francisco in car load lots?

Mr. BOOTH: I would prefer to sell it in car lots.

213 Mr. COTTON: Why?

Mr. BOOTH: Because we cater to special orders. If a man wants a quantity of any certain kind of lumber, it can be gotten to him quicker upon the car, if the service is proper. I don't say that it has been, but that would be a fair inference, and anyone I think would prefer to buy at the same price by car load rather than by ship load.

Mr. COTTON: Are there not some advantages connected with the fact that you can sell to the small dealer, whereas the cargo man can only sell to the people who buy cargoes?

Mr. BOOTH: No; the cargoes are divided. Different ones buy from the same cargo. That is, they may do it, and in practice have done it.

Mr. COTTON: But you can meet all the odd lot orders, can you not?

Mr. BOOTH: That is what we specially aim to do, to get the odd lot orders.

Mr. COTTON: These cargoes go down in what size cargoes from Portland; how many feet to the cargo?

Mr. BOOTH: I wouldn't say that I could answer that definitely, but my understanding is from half a million to a million and
214 one-half.

Mr. COTTON: You send yours down in car load lots to be delivered in the car load to any dock or wharf or side track or yard

or any other place which is reached by the switching lines in San Francisco?

MR. BOOTH: That is right.

MR. COTTON: All around the Bay, any place?

MR. BOOTH: Yes, sir.

MR. COTTON: The cargoes all go to one dock?

MR. BOOTH: No, sir.

MR. COTTON: Do they not as a rule? I mean when a ship goes down with a cargo, she goes to one dock and unloads?

MR. BOOTH: I think that is probably true, but there are many yards, of course, near together, and when they are in the channels, they move from one place to another.

MR. COTTON: But these little odd lot fellows would have to get their stuff and haul it to their yards or the place where they intend to use it.

MR. BOOTH: I have seen this, when we were interested in the yards there to some extent. The boats went into the channels there
215 and were moved along to accommodate the purchasers, who had yards directly on the channels.

MR. COTTON: But that does not cover the little fellow.

MR. BOOTH: I refer to the little fellow; yes, sir.

MR. COTTON: Have all the little fellows got docks on the channel?

MR. BOOTH: I don't say all of them. I say those who have docks on the channel. I am not acquainted with all those yards. I don't want to be understood now as saying that there is not a distinct advantage in my mind in shipping in car loads, of course that was recognized, and hence our rate. It has always been higher than the cargo rate. I meant to explain that, and I wish to repeat it.

MR. COTTON: That advantage amounts to about how much in dollars per thousand?

MR. BOOTH: Well, I think four dollars has been a fair cargo rate. Ours has been five dollars and seventeen cents. Our cost would be one dollar and seventeen cents more on that basis.

Commissioner PROUTY: We will stop here until 2 o'clock.

The Commission, at 12.35, took a recess until 2 p. m.

216

After Recess.

Commissioner PROUTY: Mr. Booth, you may resume the stand.

R. A. BOOTH resumed the stand for further cross-examination.

MR. COTTON: You have been over the road to California Mr. Booth?

MR. BOOTH: Yes, sir.

MR. COTTON: There are very heavy grades on the road south of your place?

MR. BOOTH: Yes, sir.

MR. COTTON: Over the Siskiyou Mountains?

MR. BOOTH: Yes, sir.

MR. COTTON: It takes about two or three engines to move an ordinary passenger train to the top of the mountain does it not?

Mr. BOOTH: I think in practice they use two and three; yes, sir.

Mr. COTTON: And there are heavy curves, besides the elevation?

217 Mr. BOOTH: Yes, sir.

Mr. COTTON: They make in one place a complete loop, so that one tunnel is above the other tunnel?

Mr. BOOTH: I have heard that said. I couldn't say positively. I expect it is true.

Mr. COTTON: Going up the mountains you see three or four tracks down below you?

Mr. BOOTH: Three tracks.

Mr. COTTON: On the other side, going down into Dunsmuir is a heavy hard crawl down a steep hill?

Mr. BOOTH: The hill is steep; yes, sir. There is less curvature, but I presume it is a hard hill.

Commissioner PROUTY: Can you not show those gradients, Mr. Cotton, in the same way they were shown on the Northern Pacific?

Mr. COTTON: I hardly think so.

Mr. TEAL: We will admit the road going over the Siskiyou Mountains is a heavy grade.

Commissioner PROUTY: We would like to know about how much of it there is. I have been over there once or twice. As I remember, we rode practically all day.

Mr. DILLARD: Here is a cut that we will introduce, and I will have it reduced to a written statement, the number of engines
218 at any given place, and so on.

Mr. TEAL: I am perfectly willing to have the time card put in, to show the time it takes.

Commissioner PROUTY: You take this, Mr. Dillard, and put the facts shown by that profile into words, so that we will know what the distances are.

Mr. DILLARD: Very well; I will take this one now and send a copy back from Chicago.

Mr. COTTON: Your rates into Utah and to all points east are the same as to Portland?

Mr. BOOTH: That is my understanding——

Mr. COTTON: And to Idaho you pay five cents a hundred more?

Mr. BOOTH: There is a differential, just what I can't say. We ship no lumber into Idaho.

Mr. COTTON: You do ship east of there?

Mr. BOOTH: We ship some to Utah and we ship to Colorado.

Mr. COTTON: And the statement which has been produced of your shipments in the other case is correct?

Mr. BOOTH: I presume it is absolutely correct. You speak, Mr. Cotton, of the matter of shipments. May I say something further on that? I have the statements here taken from our records. I

219 have been figuring some during the recess. I found the volume of business we have shipped south is greater than I said. The lowest we have shipped in any one year has been 15.9 per cent., exclusive of railway material, and the highest 47½ per cent. The average has been beyond 22 per cent. So I have come to the

conclusion that there is a greater percentage that has gone into the \$3.10 territory than I testified, and I am of the impression, too, that there is a greater amount of it goes into California than I testified.

Mr. DILLARD: Did you mean there was 22 per cent. went into the \$3.10 territory?

Mr. BOOTH: No, sir; the question was what we sent south.

220 Mr. DILLARD: That was 22 per cent.

Mr. BOOTH: The average has been between 22 and 23 per cent.

Mr. DILLARD: And of that, about half went to the \$3.10 territory?

Mr. BOOTH: That is what I said; but I say it is my impression, from the calculation I have made, that it exceeds one-half of the total commercial business that goes south.

Mr. COTTON: How much does it exceed it; to any great extent?

Mr. BOOTH: I think it is two thirds of it. It might be more. It would be more than less, in my opinion.

Mr. COTTON: In connection with Mr. Booth's examination, I would like to have copied and considered in evidence the report of the shipments eastbound which was made in the other case by the Booth-Kelly Company. That will be all, Mr. Booth.

Redirect examination:

Mr. TEAL: Mr. Booth, from Willamette Valley points, can you get into the Northern Pacific territory?

221 Mr. BOOTH: No sir.

Mr. TEAL: In connection with the shipment of lumber south, do you know whether or not the Southern Pacific would allow any box cars to go that way or not?

Mr. BOOTH: I couldn't say.

Mr. TEAL: On all flat cars, do you have to stake them?

Mr. BOOTH: We have to stake them; yes sir.

Mr. TEAL: And tie the stakes?

Mr. BOOTH: Yes sir. It is about \$3.50 a car, we estimate it.

Mr. TEAL: There is one question I asked, but I do not think it was answered. I wish you would state, as a matter of fact, whether or not if this understanding and agreement had not been had respecting the rates would you have made the investments you have made in the lumber industry?

Mr. BOOTH: I positively would not.

Commissioner PROUTY: What effect would be produced on your business, Mr. Booth, if your rate to the east were to be withdrawn, or if you were required to pay five cents more to Portland?

222 Mr. BOOTH: Well, we could not operate to the extent we do. If the eastern rate was withdrawn, it would limit us to a very little business. I am assuming now that the other rates were to be restored. Shall I assume that?

Commissioner PROUTY: Yes.

Mr. BOOTH: I would say it would cut our output practically in half, but we could do some business if this rate was restored.

Commissioner PROUTY: That is, it would be about as serious a

matter for you to withdraw the eastern rate as it has been to withdraw this rate?

Mr. BOOTH: Well, may I say in explaining that that — what we have been trying to do, as I hope you have noticed from the statements, is to develop the eastern trade. Our shipments have grown very rapidly from the beginning until now. In the eastbound traffic, we consider it a more desirable and a more stable market than the one below. So that we think it is an essential factor in our operating to any considerable extent.

Commissioner PROUTY: What effect will it have on your
223 eastern business if the advances are maintained which have been made.

Mr. BOOTH: The present rates?

Commissioner PROUTY: Yes sir.

Mr. BOOTH: I am quite sure we will not operate more than one mill.

Commissioner PROUTY: I am talking, not about your San Francisco rates, but about your eastern rates.

Mr. BOOTH: Yes sir; I understand.

Commissioner PROUTY: You think the effect of that would be to reduce your operations to a single mill?

Mr. BOOTH: The plan at the present time is to operate one mill only. That has been discussed with the gentlemen interested.

Commissioner PROUTY: Suppose those advances are continued, and your San Francisco rate is restored: what will be the effect upon the business?

Mr. BOOTH: Practically the same. We might operate a little bit more. I think possibly we would operate one of our larger mills and the Saginaw mill. That would mean about 35 per cent. of our present output.

224 Recross-examination:

Mr. COTTON: Just one question. Something has been asked about the cars. The cars that come into your section of the country from San Francisco come there empty, do they not, practically entirely?

Mr. BOOTH: A great many of them do.

Mr. COTTON: There is really no movement of merchandise up into the upper Willamette Valley from San Francisco?

Mr. BOOTH: I presume—it would only be a presumption—that of course there is lots of merchandise produced there by the merchants, and so on.

Mr. COTTON: That all comes from Portland, does it not?

Mr. BOOTH: No sir. If course I can only say this. I have watched the exchanges in the banks, those I am interested in and others. There is about half as much goes to San Francisco as to Portland, that we estimate goes for merchandise.

Mr. COTTON: But your consumption of merchandise in the lower valley is comparatively small, as compared with the lumber shipments?

225 Mr. BOOTH: Our merchandise sales, when we are running our mill—I mean of that put in over our counters—is about

\$100,000. Of course what we consume ourselves is a very large item in addition. I mean in the way of belting, oils, pipe and so on.

Mr. COTTON: I mean the cars that come in.

Mr. BOOTH: I don't know how many cars that would represent. That is the volume in dollars.

Mr. DILLARD: You do know, as a matter of fact that the excess of tonnage is south, do you not?

Mr. BOOTH: I am quite sure that is true.

Mr. TEAL: Mr. Chairman, the intervenors have asked me to allow them to present their testimony now, as they are very anxious to get away. It is quite convenient to me to have them do so, if it is to you.

Commissioner PROUTY: Proceed, Mr. Abel.

226

Testimony on Behalf of the Intervenors.

PHILIP BUEHNER, a witness produced on behalf of the intervenors, being duly sworn, testified as follows:

Mr. ABEL: You reside at Portland, Mr. Buehner?

Mr. BUEHNER: Yes sir.

Mr. ABEL: You are connected with the Eastern & Western Lumber Company?

Mr. BUEHNER: Yes sir.

Mr. ABEL: When was that company organized?

Mr. BUEHNER: The Eastern & Western Lumber Company was organized in 1902; but the Eastern Lumber Company, the mill which we now own, was organized in 1899.

Commissioner PROUTY: I was not here when Mr. Buehner testified in the other case. Did you go over all this in that case?

Mr. BUEHNER: No sir; I did not.

Commissioner PROUTY: All right; proceed.

Mr. BUEHNER: The Eastern mill, the one we have now, was organized, I think, in June, 1899.

227 Mr. ABEL: What has been the capacity of your mills since 1899?

Mr. BUEHNER: We run about from 60,000,000 to 100,000,000 a year—pretty close to 85,000,000 a year.

Mr. ABEL: During the past eight years?

Mr. BUEHNER: Yes; the past seven years.

Mr. ABEL: Where is your mill located?

Mr. BUEHNER: It is located in Portland, Oregon.

Mr. ABEL: From what source do you get your timber, your logs?

Mr. BUEHNER: We bring them up the Columbia River, towing them up the Columbia River.

Mr. ABEL: On the Washington side?

Mr. BUEHNER: Yes sir.

Mr. ABEL: Does your company do its own logging?

Mr. BUEHNER: About 50 or 60 per cent of it.

Mr. ABEL: Please examine this blueprint and state what it shows.

Mr. BUEHNER: This is a similar blue print to the one I introduced in the other case. It simply shows the price of logs for the last eight

years, and also the selling price, actual sales, of common lumber, which is about three quarters of 70 per cent. of the lumber—
228 common lumber. That is base lumber.

Commissioner PROUTY: You may introduce that in this case also, but we will not spend any time on that, because we will refer to Mr. Buehner's testimony in the other case. We do not want to go over all this again.

(The blue print referred to was received in evidence, and marked "Intervenor's Exhibit 1.")

Mr. ABEL: You say 70 per cent. of the lumber manufactured at your mill is common lumber?

Mr. BUEHNER: Well, more than 70 per cent. of our average is common lumber.

Mr. ABEL: Where is it marketed, and where has it been marketed during the past few years?

Mr. BUEHNER: It is marketed all over the world. We export quite a good deal.

Mr. ABEL: What portion goes to San Francisco or Bay points?

Mr. BUEHNER: The last two or three years, I doubt whether more than 10 or 12 per cent. went to San Francisco Bay points.

229 Mr. ABEL: I want to call your attention to this diagram, particularly to the sharp drop in the price of lumber in the fall of 1903. How do you explain that?

Mr. BUEHNER: That was a drop due to the taking out, in January, of this \$3.10 rate from Portland to San Francisco Bay points. The price of lumber dropped there in one month \$2. Then it kept on dropping the next three or four months, until we sold common lumber for a dollar less than the price of our logs in Portland.

Commissioner PROUTY: I think every lumber man here who has given an account of this business has shown a loss in the year 1904. Was that all due to the taking out of this rate to San Francisco?

Mr. BUEHNER: Oh, I presume not, Mr. Commissioner; but the big drop was caused just that month when the rate was taken out. There was a drop of \$2 just that one month.

Mr. ABEL: What do you know about this \$3.10 rate, Mr. Buehner?

230 Mr. BUEHNER: The first I heard of the \$3.10 rate was in 1899, when we built the Eastern mill, and after the rate was made, we definitely decided to locate the mill at Portland, Oregon. We started the construction in July, 1899, and it was largely due to the fact that my partner as well as myself thought the rate was a permanent rate, so far as we were concerned, to Portland, and that the rate really was made to Portland before it was made to the valley. The western mill, I may say, though for information, had been built six or seven years prior to that at Portland. That was a different company, and I had no interests at that time in the Western Lumber Company. In fact, several other mills were built there in the years 1900 to 1903. I can give the names, if you wish them.

Mr. ABEL: Just name the mills that were built in reliance upon the \$3.10 rate.

Mr. BUEHNER: Our man forwarded this letter to me since I left

Washington. The East Side Mill and Lumber Company, capacity 100,000 feet, commenced operations in June, 1903.

The Jones Lumber Company very largely increased their capacity in that time.

The Oregon & Washington Lumber Company commenced operations in 1904, but they had commenced the construction long
231 before that time. It takes about a year to a year and a half to build a mill.

The Portland Lumber Company mill was started by Mr. Ritan in 1900. It was built a short time before that, but it was started in 1900, and it has to-day a capacity of over 200,000 feet.

The Standard Box & Lumber Company mill was built in 1903.

The Eastern & Western Lumber Company is my mill.

The Peninsula Lumber Company mill was built in 1902 and 1903. It is a large mill and has a capacity of something like 150,000 feet per day.

There are several other mills near Portland which are in this statement, but which I did not include.

Commissioner COCKRELL: How long ago were they built before this rate was put in?

Mr. BUEHNER: No, they were built during the time the rate was in effect.

Commissioner COCKRELL: How many mills were there?

Mr. BUEHNER: The Portland Lumber Company, the old mill—not the present, but the old mill—was built prior to 1900, and then was rebuilt about two years after that, and very largely in-
232 creased. The North Pacific Lumber Company—I did not mention that—was there before, and the Jones Lumber Company was there before.

Mr. ABEL: There were three companies there before that?

Mr. BUEHNER: Yes sir. No; there were other companies there that I didn't mention. There were four or five other companies there which are not mentioned here at all. They were there before.

Mr. ABEL: They were there before the rate was put in?

Mr. BUEHNER: Yes sir.

Mr. ABEL: How many companies were there altogether before the rate was put in?

Mr. BUEHNER: I think there were five mills there, and there have been about seven built since the rate was put in.

Mr. ABEL: Were any of the mills in operation in the upper Willamette Valley at the time the \$3.10 was established?

Mr. BUEHNER: There were some few small mills up there; yes sir—very small little local mills.

233 Mr. ABEL: Have you any knowledge as to the cost of producing lumber at Portland as compared to the cost in the upper Willamette Valley?

Mr. BUEHNER: From the best information I can gather and I have tried to be careful about that, I have come to the conviction that they can put their lumber, all grades, finished lumber, on cars at just about what our logs cost us in Portland.

Commissioner PROUTY: Laying out of the case entirely the matter

of stumpage or the cost of the logs, does it cost you more to manufacture logs in Portland than it does them?

Mr. BUEHNER: It seems like it, from what they report. It cost us last year, as I testified here, \$4.47. It began with \$3 and something, and graduated up, as I testified here, until last year it was \$4.47 a thousand, and the logs last year—

Commissioner PROUTY: Never mind the logs. What does it cost them to manufacture the log when it is at the mill?

Mr. BUEHNER: From their testimony, I should say it costs them less.

234 Mr. TEAL: Pardon me. How much did you say it cost you to manufacture, Mr. Buehner?

Mr. BUEHNER: It cost us last year \$4.47 a thousand. I can reduce that—

Commissioner PROUTY: You need not go into the details again.

Mr. ABEL: The principal difference then, is in the value of the stumpage. The stumpage in southern Oregon is so much lower.

Mr. BUEHNER: And the fixed expenses. Our labor is always higher. In large cities it is always higher. We probably pay 20 per cent more for labor than they do in the mills. I don't know how it is in the logging camps.

Mr. ABEL: What has been the value of the San Francisco market to your mill since the establishment of the \$3.10 rate? I mean what difference has resulted from the taking of that rate?

Mr. BUEHNER: I was manager of the Eastern Company at one time, and as long as we could ship down by car, I am satisfied that the Eastern Company shipped about 25 per cent. into what we call

235 Bay points. We have an office down there and it is our best market. Since that time, of course we have not shipped very much.

Mr. ABEL: Do any of your customers want less than cargo shipments of lumber?

Mr. BUEHNER: Yes. The large buyer, the large man can ordinarily take a cargo, a schooner load. We ordinarily figure a schooner load to be about eight hundred thousand feet. They vary in size, though, and it takes a pretty good man to buy at one time a cargo of lumber. All of the buyers that have rail connection, and most of them, have, much prefer to buy their lumber as they require it in carload lots and have it delivered right in their yards. They much prefer it. That is, we ordinarily, in our minds, figure about two dollars a thousand difference between the price we can get for a rail shipment and the price we have to deliver a cargo on.

Mr. ABEL: Do you consider you are entitled to as low a rate to Bay points as the upper Willamette mills?

Mr. BUEHNER: Well, my impression would be that we ought to have a lower rate to San Francisco than the Valley mills.

Mr. ABEL: For what reasons?

236 Mr. BUEHNER: Probably fifteen per cent of their total output goes into the Bay points, but they have an advantage over us of about \$2.50 or \$3.00 per thousand on their entire output, which puts us at a disadvantage on our output.

Mr. ABEL: That is, the cost of manufacture and their lower stumpage?

Mr. BUEHNER: Stumpage and everything, of course.

Mr. ABEL: What have you to say about competitive conditions at Portland, whether competition exists at Portland?

Mr. BUEHNER: Certainly; water competition.

Mr. ABEL: Has your market been restricted to Bay points in the application of the five dollar rate?

Mr. BUEHNER: So far as the rail shipments go, they have; yes, sir.

Mr. ABEL: To what extent?

Mr. BUEHNER: I don't think we ship by rail two per cent. of our output for the last two years. I am guessing now, but maybe three or four per cent.—a very small amount of our output.

Mr. ABEL: What was your percentage under the \$3.10 rate?

237 Mr. BUEHNER: I am estimating that too, but I think I am safe in saying that we shipped 25 per cent.; if anything, a little more than 25 per cent., into the Bay points.

Mr. ABEL: By rail?

Mr. BUEHNER: By rail.

Mr. ABEL: What have been your cargo rates during the past eight years from Portland to the Bay?

Mr. BUEHNER: The cargo rates vary somewhat, but if you take an average, it runs very close to five dollars a thousand, or five dollars and fifty cents. We just had a cargo at four dollars and fifty cents, and the next cargo shipped before I left was four dollars and seventy-five cents. We never get a cargo down to three dollars and fifty cents excepting in special cases, where they load the hold of the schooner with some other commodity, and we get the deck load, the top loading; but I never recollect the time that we got that for less than three dollars and seventy-five cents. I never knew the time when we had three dollars and fifty cents on the San Francisco schooner rate.

Mr. ABEL: The rates were higher in 1906, were they?

238 Mr. BUEHNER: Yes; they ran up to nine dollars and fifty cents. We paid nine dollars and fifty cents.

Mr. ABEL: What was the cause of that?

Mr. BUEHNER: There was a great demand for schooner rates after the San Francisco fire.

Mr. ABEL: That has fallen off now?

Mr. BUEHNER: That has fallen off now to four dollars and seventy-five cents and five dollars. But in buying cargo lots there is always more or less breakage. A man buys a great deal of lumber that he doesn't need. He has to handle it in his yard and pile it up; and we have always got to sell lumber by cargo in San Francisco at less than the ordinary price of common lumber, which is not the case where a man can ship by rail.

Mr. ABEL: You say your sales, when made in cargo lots, are limited to the large buyers?

Mr. BUEHNER: Yes.

Mr. ABEL: Small buyers who want merely a car load or two, do not buy them?

Mr. BUEHNER: Most of the small buyers never buy a cargo of lumber.

Mr. ABEL: Do you ship any broken lots by vessel?

Mr. BUEHNER: Very little. We do that occasionally, but very very little. That is rather the exception than the rule.

239 Mr. ABEL: That is all.

Commissioner PROUTY: Mr. Teal, do you desire to ask any questions?

Mr. TEAL: Just a very few.

Commissioner PROUTY: You may proceed.

Mr. TEAL: On a \$3.10 per ton rate, Mr. Buehner, that is equal to five dollars and twelve cents a thousand?

Mr. BUEHNER: About that; yes, sir.

Mr. TEAL: And on a five dollar per ton rate, that is equal to eight dollars and twenty-five cents a thousand, is it not?

Mr. BUEHNER: I suppose so, about that.

Mr. TEAL: Do you pay for loading these vessels at your dock?

Mr. BUEHNER: We deliver within reach of the tackle on the schooner.

Mr. TEAL: You deliver at the ship's tackle on the deck, and the ship loads it?

Mr. BUEHNER: Yes, sir.

Mr. TEAL: Who unloads it at the other end?

240 Mr. BUEHNER: The ship takes it out, and we handle it away from the ship's tackle.

Mr. TEAL: Who takes it out and puts it to the ship's tackle on the dock?

Mr. BUEHNER: The steamer does.

Mr. TEAL: So that a charter rate means from tackle to tackle, does it not?

Mr. BUEHNER: Yes, sir.

Mr. TEAL: You run it down on your dock, they put it on the ship, and they take it off at the other end, and whoever buys it handles it from there?

Mr. BUEHNER: But that costs more than handling it in the car, if that is what you are driving at.

Mr. TEAL: No; I am not driving at anything. I am just asking the question. So that on the basis even of a five dollar charter, to start with, the Portland mill, on the water rate, would have three dollars and twenty-five cents over the rail rate at five dollars, would it not?

Mr. BUEHNER: Just repeat that please.

Mr. TEAL: Take a charter at five dollars and the rail rate of five dollars, and it would give whoever could ship by charter three dollars and twenty-five cents advantage to start with, would it

241 not? I mean simply at the starting point.

Mr. BUEHNER: Yes. I will say yes. I will see what the next question is.

Mr. TEAL: I have no more. You can explain anything you desire.

Mr. BUEHNER: If you got the same price for your lumber that you ship by cargo, but you don't. As a matter of fact, anybody who ships down to that place by schooner must take one dollar and fifty cents to two dollars less.

Mr. TEAL: You have already said it was equivalent to one dollar and fifty cents to two dollars a thousand advantage, the ability to ship by rail, or equivalent to that advantage over the cargo shipment. In order to arrive at this estimate, I have prepared from the record of charters for the past five years, up to February 1903, the charters before the San Francisco raise, and they varied from three dollars and seventy-five cents to four dollars and fifty cents from Portland to San Francisco. Would you say that was a fair average from 1903 to 1906?

Mr. BUEHNER: No. Is that a sailing vessel charter or a steam schooner charter?

Mr. TEAL: This is a record of charters during five years.

242 Mr. BUEHNER: That is very indefinite. I might explain that. You know with a sailer charter you have to pay for the towing in and out of the harbor. That basis I think is what they call the old sailer charter, and a man in the business knows how to figure that.

Mr. TEAL: What was the Virginia? Do you remember her?

Mr. BUEHNER: The Virginia?

Mr. TEAL: Yes.

Mr. BUEHNER: She was a sailer.

Mr. TEAL: What is the Noyo? That is a steamer, is it not?

Mr. BUEHNER: I don't know. I never heard of it.

Mr. TEAL: I will show exactly what it is.

Mr. ABEL: Are we to understand, Mr. Buehner, that in addition to the charter rates there is a charge for towing down at Salem and Columbia across the bar?

Mr. BUEHNER: On all sailing vessels the towing is paid by the mill. It is ordinarily fifty cents a thousand; but that is all implied when they make a charter by sailer.

Mr. TEAL: That is included, then?

Mr. BUEHNER: That is additional.

243 Cross-examination:

Mr. COTTON: You say you shipped out two per cent. only for some period. I did not catch the period.

Mr. BUEHNER: Since this \$3.10 rate was in—I am guessing now—I don't think over two or three per cent. of our output by rail went into San Francisco Bay points.

Mr. DILLARD: Did you say since the \$3.10 rate was in?

Mr. BUEHNER: Repealed.

Mr. COTTON: Is the rate by steamer a little higher than the rate by sailing vessel—that is, the charter?

Mr. BUEHNER: Yes; it is always a little higher.

Mr. COTTON: Is this taken down by regular line steamers; that

is, I mean steamers that are engaged in carrying passengers and freight generally for the public, or is it taken down by cargo lumber ships that devote their carriage entirely to lumber at one mill?

Mr. BUEHNER: Well, usually by schooners especially equipped to carry lumber, and they carry lumber specially, although some of them carry passengers too, to a very limited amount.

Mr. COTTON: The business is now mainly in these special
244 class lumber schooners?

Mr. BUEHNER: Special lumber schooners.

Mr. COTTON: They come up in what way?

Mr. BUEHNER: They come up light, most of them.

Mr. COTTON: Is there any business from any other point or place to San Francisco than Portland and Willamette Valley points, in lumber?

Mr. BUEHNER: In schooners?

Mr. COTTON: Well, anyway; by rail, schooners, or otherwise.

Mr. BUEHNER: Yes; the San Francisco Bay points get lumber from the whole Pacific Coast, all the mills on the Oregon coast, and the Columbia River mills and all the Grays Harbor and Puget Sound mills.

Commissioner PROUTY: And you sell lumber to all parts of the world, do you not?

Mr. BUEHNER: Yes, sir.

Mr. COTTON: Is there any lumber produced down in Coos Bay?

Mr. BUEHNER: Yes, sir.

Mr. COTTON: Are there any large mills down there?

Mr. BUEHNER: I have never been there, but just from general knowledge I know there are some down there.

245 Mr. COTTON: Of large capacity?

Mr. BUEHNER: They are reported to have a good sized capacity; yes, sir.

Mr. COTTON: Do you know what the cut is down there per year, on Coos Bay?

Mr. BUEHNER: No; except by hearsay, Mr. Cotton.

Mr. COTTON: I mean by reputation.

Mr. BUEHNER: I understood they cut last year about three hundred million—that is, that whole bay, not one particular mill.

Mr. COTTON: Is there any cut down at Tillamook?

Mr. BUEHNER: Not very much.

Mr. COTTON: Do you know whether there is any cut up at the places on Washington coast that have no railroad facilities?

Mr. BUEHNER: Well, there is South Bend, Willapa Harbor and Grays Harbor. They are very large shippers.

Mr. COTTON: They have railroad facilities, branch lines of the Northern Pacific.

Mr. BUEHNER: Some of the mills have no rail facilities.

Mr. COTTON: But then the cargo shipments from there are very large, are they not?

246 Mr. BUEHNER: Yes, sir; very large.

Mr. COTTON: There are some mills up on Puget Sound that have no rail facilities at all?

Mr. BUEHNER: Yes, sir.

Mr. COTTON: On the west side?

Mr. BUEHNER: Yes, sir.

Mr. COTTON: Are they large mills?

Mr. BUEHNER: Some are very large.

Mr. COTTON: The — mill had no rail facilities at all, did it?

Mr. BUEHNER: No, sir.

Mr. COTTON: And that was at one time the largest producing mill in the northwest?

Mr. BUEHNER: Except when they transferred on barges. That was the only way they could get across the Sound and connect.

Mr. COTTON: The mills at Marshfield and these various mills that have no rail facilities are all shippers to San Francisco in competition with your mills in the Willamette Valley points?

Mr. BUEHNER: Yes, sir.

Mr. COTTON: Tell us how San Francisco compares with
247 any other market that you reach, so far as price is concerned?

Is it high, low, medium or what kind of market is it generally.

Mr. BUEHNER: It is a market where you get the very best prices and the very lowest prices. My experience is a little different from that of Mr. Booth, as he testified this morning. We ship nothing but No. 1 stock to San Francisco, No. 1 clear, and we always insist on a very good price for our lumber in the San Francisco market; but then I know they sell lumber very cheap down there, less than I thought.

Mr. COTTON: You say you sell nothing but No. 1 down there?

Mr. BUEHNER: We intend to ship nothing but No. 1 common to San Francisco.

Mr. COTTON: But all these little mills send their No. 2 common in there, and it depresses the price of No. 2 common very low, does it not?

Mr. BUEHNER: Yes; San Francisco depends on the water. We have some very large buyers there. A lot of the buyers own their own steam schooners, and when they get the lumber down
248 there, they grade it and they virtually set the price or grade according to the capacity of the mill man to stand it, or his inability to kick.

Mr. COTTON: In the fall of 1903, was there not a slump in the general market all over the whole northwest?

Mr. BUEHNER: In 1904 there was a slump, and from my chart here I see it began in the fall of 1903.

Mr. COTTON: Was there not a general slump through the northwest at that time?

Mr. DILLARD: You say in the fall of 1903?

Mr. BUEHNER: Yes; in the fall.

Mr. COTTON: The rate was taken out on January 1st, 1904.

Mr. BUEHNER: Portland was taken out in August, 1903, and the very next month our prices dropped, according to this chart. I didn't know that when I made the chart.

Commissioner PROUTY: Was it in January the other rate was taken out?

Mr. TEAL: On January 1st, the Valley rate was taken out.

Mr. BUEHNER: And then she dropped a dollar and fifty cents in January. She dropped two dollars in August or during the month of September, and a dollar and a half during the month of January.

249 Mr. COTTON: Was there not a general slump on eastern shipments as well?

Mr. BUEHNER: Well, I was not in Portland in the fall of 1903, but the chart shows a big slump.

Mr. COTTON: This \$5 rate, as I understand it, extends to points out of San Francisco as well as San Francisco?

Mr. BUEHNER: You mean Stockton and Sacramento?

Mr. COTTON: Yes.

Mr. BUEHNER: No; I don't know.

Mr. COTTON: What does it cost you to get lumber that you send down by cargo out to these points which are away from the bay?

Mr. BUEHNER: That depends on the location. We ordinarily figure about \$2. That I had reference to before. We ordinarily figure about \$2, in addition to the charter rate.

Mr. COTTON: I mean to points that are away from the Bay?

Mr. BUEHNER: That depends on the local out.

Mr. COTTON: What do you have to pay besides the local out? Any other additional charges?

250 Mr. BUEHNER: We have to pay for the loading on the cars and the switching charge, which all comes under this same expense, which is about a dollar and a half or two dollars, if we ship it out, or if we bring it into the yards, it all amounts to about the same thing, about a dollar and a half or two dollars.

Mr. COTTON: Then it takes about a dollar and a half or two dollars for you to get the stuff on the car, and then on top of that—that is a dollar and a half or two dollars a thousand?

Mr. BUEHNER: Yes, sir.

Mr. COTTON: And then on top of that you have to pay the local rate from a San Francisco Bay point to a point in the interior of California, north of 'Frisco, say?

Mr. BUEHNER: Yes, sir.

Mr. COTTON: And that is a burden which falls on you as a cargo shipper?

Mr. BUEHNER: Yes, sir.

Mr. COTTON: Now, on your clear lumber which you send down there, and which Mr. Booth sends down there—that weighs how much?

251 Mr. BUEHNER: If it is kiln dried and surfaced, which is what you mean, I suppose, by clear, it weighs about 2,000 pounds to the thousand feet.

Mr. COTTON: This No. 1 common which you send down there—what kind of stuff is that?

Mr. BUEHNER: That is rough green.

Mr. COTTON: Do you sell much kiln dried stuff, flooring and stuff like that down there—higher grades than No. 1?

Mr. BUEHNER: No. 1 common, you mean? We sell considerable No. 1 clear down there, and if we ship it by water we have to pay the same rate per thousand as green lumber. Of course if we ship it by rail, we get the benefit of the difference in weight.

Mr. COTTON: Do you send much of that higher grade lumber, that is dried down by cargo or by rail to San Francisco?

Mr. BUEHNER: We would like to ship that by rail if we could get the cars. If not, we do ship it occasionally in the hold of a schooner.

Mr. COTTON: There is an objection to making a deck load of it, is there?

252 Mr. BUEHNER: Yes; it gets wet on the deck.

Mr. COTTON: Is there much shipment of that kind of material to San Francisco of that higher grade of lumber by anybody?

Mr. BUEHNER: Yes; there are big buyers. That is one of our best markets for high grade lumber.

Mr. COTTON: I mean better than No. 1 common, dry stuff?

Mr. BUEHNER: Yes, sir.

Mr. COTTON: That weighs no more than 2500 pounds or less per thousand?

Mr. BUEHNER: Yes sir; that is one of the best buyers of the trade.

Mr. COTTON: On that you pay at the present time \$4.50 per ton, when it weighs no more than 2,000 pounds?

Commissioner PROUTY: Or \$4.50 per thousand.

Mr. COTTON: Yes; or \$4.50 per thousand, whatever its weight may be.

Mr. BUEHNER: When they take nice clear flooring strips and load them in a steamer, the way they put slings around it, they damage a great deal, and it is quite a loss, in shipping nice clear lumber by steamers; but we pay everything board measure by steamer.

253 Mr. TEAL: Mr. Buehner, we have all the same rate on this fine lumber, have we not, Portland and the Valley?

Mr. BUEHNER: Yes.

Mr. TEAL: There is no dispute about that.

Mr. COTTON: But I want to show that this great differential Mr. Teal comments on does not exist as to a large part of the shipments. Just take your shipments for example. What would you say would be the average weight of the shipments you make to San Francisco per thousand feet on different grades.

Mr. BUEHNER: The rate on green lumber is 3300 pounds, and quite a large amount of that goes in there. Probably of the total quantity that is shipped into San Francisco, I should say 50 per cent. I guess it is more than that. I will say 60 per cent., and the other would be kiln dried stock, weighing about 2,000 pounds.

Commissioner PROUTY: We know what this lumber weighs. We have had that a thousand times already, now.

Mr. COTTON: Are you sure that this charge of \$2 exists, that this extra additional expense of about \$2 a thousand exists, as to all your shipments?

254 Mr. BUEHNER: No, it does not, Mr. Cotton. Some of the larger yards are right on the slip. It is only the man who is back from the dock and there are a great many yards in Oakland and other places.

Commissioner PROUTY: I understood you to say it was worth about \$2 a thousand if you had the privilege of shipping by cars, as against a cargo shipment. Is that right?

Mr. BUEHNER: Where a big shipper buys——

Commissioner PROUTY: Never mind whether it is a big shipper or a small shipper. Take your business as a seller of lumber in San Francisco. How much a thousand feet is the privilege of shipping by carloads rather than by cargo worth to you?

Mr. BUEHNER: I will say easily a dollar and a half per thousand—easily.

Mr. COTTON: That is on what?

Mr. BUEHNER: On all grades of lumber; more on clear, of course, but it would average easily a dollar and a half.

Mr. DILLARD: If I understood you right, your rates began to drop about July, 1903?

255 Mr. BUEHNER: About August or September.

Mr. DILLARD: About August 1903, and the rate to Portland at that time was made \$5?

Mr. BUEHNER: I think it was \$5.

Mr. DILLARD: And the price was dropping in January, 1904?

Mr. BUEHNER: Yes; it dropped \$2 in September, and a dollar and a half in January, 1904.

Mr. DILLARD: On the 1st of January, 1904, the rate from Willamette Valley points was raised to \$5 per ton and so continued until May?

Mr. BUEHNER: Yes.

Mr. DILLARD: But notwithstanding that fact your price in Portland still continued to drop?

Mr. BUEHNER: Yes; that is right.

Mr. DILLARD: Did I understand you to say that one of your mills was built on the faith of this \$3.10 rate?

Mr. BUEHNER: The Eastern was organized and commenced building in 1899.

Mr. COTTON: Did you have any correspondence with anybody who promised the continuance of these rates?

Mr. BUEHNER: No; my partner had a conversation with Mr. Markham. I was not present, though, at the time.

256 Commissioner PROUTY: That seems to be all.

Mr. TEAL: Just a question in response to what Mr. Cotton asked him. Mr. Buchner, are not the larger yards in San Francisco situated where the vessel loads right into the yard, like Long Wharf at Oakland?

Commissioner PROUTY: I do not think we will spend time on that, Mr. Teal. He has given his judgment as to the advantage it is to ship by carloads, and you know what his opinion is.

Mr. TEAL: Then I would like to ask one more question. In

speaking of the better grades of lumber, will you ship those by vessel if you can get a car?

Mr. BUEHNER: We prefer to ship them by car.

Mr. TEAL: And it is the same rate as the Valley rate.

Mr. BUEHNER: Whatever the rate is.

Mr. COTTON: This \$4.47 cost is simply from out of the water through the mill, is it not?

Mr. BUEHNER: Yes sir! and including our fixed charges, taxes, insurance and depreciation.

Commissioner PROUTY: That is all with Mr. Buehner.
257 Whom will you call next.

Mr. ABEL: Call Mr. Poulsen.

J. POULSEN, a witness produced on behalf of the intervenors, being duly sworn, testified as follows:

Commissioner PROUTY: Mr. Abel, what do you propose to prove by Mr. Poulsen?

Mr. ABEL: Practically the same.

Commissioner PROUTY: We will not hear the details. We will assume that Mr. Buehner has told the truth about it. Let them dispute it on the other side. Unless Mr. Poulsen has some new facts to state, we decline to hear him.

Mr. POULSEN: I would like to state this, if you please——

Commissioner PROUTY: We cannot sit here for a month to hear this same story told over and over again.

Mr. POULSEN: But I would like to say that my opinion about the cause of the drops is entirely different from all the lumbermen here.

258 Commissioner PROUTY: The cause of what?

Mr. POULSEN: The cause of the drop in prices, this year as well as in 1903. I lay them to national causes, and not to any change in the freight rates.

Commissioner PROUTY: I think you stated that in your testimony in the other case.

Mr. ABEL: Do you know how the \$3.10 rate came to be established?

Mr. POULSEN: Yes.

Mr. ABEL: Have you personal knowledge of that?

Mr. POULSEN: Yes sir.

Mr. ABEL: State it briefly to the Commission.

Mr. POULSEN: The Southern Pacific Railway Company, through their agent in Portland, Mr. Markham, went to the mills, and asked the mills there what rate they would have to give them, what rate the railroad would have to give them so as to compete with water rates, and we told them what was required. After some talk, they gave us that rate.

Commissioner PROUTY: I do not understand that there is any question at all but what the rate was made to meet the water
259 rate. That would be the only reason for it. What do you say the cargo rate has been from Portland to San Francisco for the last six years?

Mr. POULSEN: They have varied from \$3.50 to \$10.00.

Commissioner PROUTY: Laying out of account the very high cargo rates following the San Francisco fire, what have the cargo rates averaged?

Mr. POULSEN: I should say \$4.25.

Commissioner PROUTY: What are they now?

Mr. POULSEN: I think the last was \$4.75. They were down to \$4.50 but advanced again.

Commissioner PROUTY: When you speak of a cargo rate of \$4 or \$4.50, do you include a towage charge to the vessel to the mouth of the river?

Mr. POULSEN: No; that is net.

Commissioner PROUTY: Do you pay that charge in addition?

Mr. POULSEN: The towage charge?

Commissioner PROUTY: Yes; the towage charge.

Mr. POULSEN: We do not. We sell all our lumber on dock. We don't sell delivered in San Francisco as a rule.

Commissioner PROUTY: When you say the cargo charge 260 is \$4, is that the total charge which the shipper has to pay?

Mr. POULSEN: I said \$4.25.

Commissioner PROUTY: Well, \$4.25.

Mr. POULSEN: Yes; that is the total.

Commissioner PROUTY: That is the total cost?

Mr. POULSEN: Yes sir.

Mr. ABEL: Mr. Poulsen, in your judgment should Portland have as low a rate as or a lower rate than the upper Willamette Valley?

Mr. POULSEN: In my judgment they should have a lower rate, on account of having water competition; but we would be satisfied with the same rate.

Cross-examination:

Mr. COTTON: Mr. Poulsen, about this towage and pilotage of vessels. Does that relate to steam or to steam sail boats?

Mr. POULSEN: The towage that was spoken about here before I think only relates to sailing.

Mr. COTTON: On sailing vessels you do what, with reference to pilotage and towage?

261 Mr. POULSEN: We don't do anything. We sell our lumber on our docks.

Mr. COTTON: I mean whoever pays the charter rates?

Mr. POULSEN: Well, you can charter sailing vessels both ways—either say the mill pays it or that the vessel pays it, but the result would be the same.

Mr. COTTON: And that increased charge for towage is estimated to be about what per thousand feet?

Mr. POULSEN: Well, the towage is half a dollar.

Mr. COTTON: Half a dollar per thousand.

Mr. POULSEN: Yes sir.

Mr. COTTON: These rates of \$4.25 and \$4.75 cents are steam schooner rates?

Mr. POULSEN: Yes sir.

Mr. COTTON: And so a sailing schooner would be higher than that, would it, or lower?

Mr. POULSEN: Very near the same. As a rule, they are a little lower, but not much.

Mr. COTTON: Do these go out in complete cargoes or broken up stuff?

Mr. POULSEN: Both ways.

Mr. COTTON: In saying that you think Portland ought
262 to have a lower rate, do you mean they should have a lower rate than a \$3.10 rate?

Mr. POULSEN: I mean they should have a lower rate than the inland people, on account of having water competition.

Mr. COTTON: But you do not express your opinion about the reasonableness of the rate?

Mr. POULSEN: No sir.

Mr. ABEL: He was not asked that.

Mr. COTTON: That is what I understood, but I just wanted to make it clear.

Mr. POULSEN: No.

Mr. TEAL: The greater proportion of the cargo shipments from Portland are steam schooners, are they not?

Mr. POULSEN: Yes sir.

Mr. TEAL: And when anyone speaks of making a charter, the charter party covers the total cost that is paid the vessel, does it not?

Mr. POULSEN: Steam schooners, yes.

Mr. TEAL: But for any vessel?

Mr. POULSEN: No. That is, the charter party generally
263 says whether the charter shall pay the towage or whether it is a net price.

Mr. TEAL: And the prices you refer to were for steam schooners, were they not? You have just given some prices.

Mr. POULSEN: Yes sir.

Mr. COTTON: You ship all grades of lumber to San Francisco, or only common?

Mr. POULSEN: All grades.

Mr. COTTON: High, low and all classes.

Mr. POULSEN: Yes sir.

Mr. COTTON: It is a good market for high grade stuff?

Mr. POULSEN: Yes sir.

Mr. COTTON: You agree with Mr. Buehner in that part of his testimony?

Mr. BUEHNER: Yes sir.

Mr. COTTON: That is all.

Mr. ABEL: That is all on behalf of the intervenors, if the Commission please.

Commissioner PROUTY: Mr. Teal, you may proceed.

264 Mr. TEAL: I want to shorten it as much as I can.

Commissioner PROUTY: You need not introduce any witness who will simply repeat what Mr. Booth has already said. Mr. Booth was one of the earliest operators in that section. He has told the whole story. This is a very important matter, and we are

anxious to get at every fact which bears upon the disposition of it; but it does not in any way help the Commission to hear that same story told half a dozen times by half a dozen different men. Produce any witness who has any new facts to state, but do not go over the same ground with any additional witness.

Mr. TEAL: I will not, and I did not intend to.

Mr. COTTON: There is nobody else who can refer to any contract?

Commissioner PROUTY: I do not think Mr. Booth referred to any contract.

Mr. COTTON: I mean any understanding, even.

Mr. TEAL: I have witnesses——

Commissioner PROUTY: I do not think Mr. Booth testified to any understand- which could be regarded in the light of a contract or in estoppel, or anything of that sort, except insofar as the railroad company which puts in effect and maintains in effect a certain
265 rate may be held to be, in a sense, estopped, or excluded from changing that rate after an industry has been built up and strengthened.

Mr. TEAL: That is all I have ever claimed for it, and I have other witnesses to the same effect, but I did not intend to introduce them for the same purpose. Will you permit me to ask you one question, your Honor? It will shorten it.

Commissioner PROUTY: Yes.

Mr. TEAL: Does the Commission care to hear any more testimony as to the establishment of mills since the date about which Mr. Booth has testified?

Commissioner PROUTY: I think you should inform us how many mills there are in this valley, and about when those mills were constructed and came into operation.

Mr. TEAL: I will do that, very briefly.

Commissioner PROUTY: And whether the owners of the mills own their lumber, when they bought the lumber, and facts of that kind.

Mr. COTTON: The only reason I suggest that other question is that I see other gentlemen in the room who tell entirely different stories from that of Mr. Booth.

266 Mr. TEAL: I would be very glad to have them called. If they are important witnesses, call them.

Commissioner PROUTY: There does not seem to be much question about why these rates were established. It is perfectly apparent that no one can operate in the Willamette Valley unless they have a rate which is competitive with the water rate. These rates were undoubtedly established in competition with water, in order to enable that valley to do business.

Mr. TEAL: I will show that by their witnesses, before I get through.

Commissioner PROUTY: If that is not so, the facts will develop as we proceed with this case.

A. C. DIXON, a witness produced on behalf of the complainants, being duly sworn, testified as follows:

Mr. TEAL: Mr. Dixon, will you please state to the Commission the number of mills there are in the Willamette Valley District covered by the rate as it existed just prior to April 28, 1907?

Mr. DIXON: Approximately 250.

Mr. TEAL: Will you state as nearly as you can substantially the amount of their total capacity?

Mr. DIXON: The total capacity is about 4,522,000—four million and a half in round numbers.

Mr. TEAL: The output, of course, you do not know?

Mr. DIXON: That varies from time to time.

Commissioner PROUTY: How much would that figure up a year, Mr. Dixon?

Mr. DIXON: Four and a half million feet a day for 250 working days. It would be about 1,100,000,000, in round numbers.

Commissioner PROUTY: How much lumber was ever sawed in any one year by these mills?

Mr. DIXON: Well, approximately, as near as our records determine, from the investigation I have conducted, half of their capacity. I don't believe the average runs over half of their maximum capacity.

Commissioner PROUTY: Six or seven hundred millions a year?

268 Mr. DIXON: Yes; that is about right—about 600 million.

Commissioner PROUTY: How much of that lumber was shipped out of the country, and how much of it was sold in the country, in the Willamette Valley?

Mr. DIXON: I couldn't tell you definitely about that, only in a relative way. There was more shipped out and less of it used locally than was shipped out and used locally by the mills of Oregon as a whole, for two reasons: One, that they had no other outlet. I mean more shipped by rail. One, that they had no other outlet, and the other that the local consumption would not be as great around the small towns and mill communities as it would be in Portland and the larger towns.

269 Commissioner PROUTY: So you say that, of this six hundred millions, four hundred millions and over was shipped out?

Mr. DIXON: I think so, for the reason that our records show that of the total production of the State one-half was shipped out. That corresponds with what I stated awhile ago, that there would be more shipped out and less used in the valley than in other places.

Commissioner PROUTY: It would follow then that your company shipped about one-fifth of all that was shipped out.

Mr. DIXON: I think that is about right; one-fifth or more.

Commissioner PROUTY: Do you think the relative movement to the south and to the East was about the same in the case of all the mills as it was in the case of your mills?

Mr. DIXON: No; the smaller mills further to the south would ship

more to the South and the larger mills further north would ship more to the East.

Commissioner PROUTY: How do these small mills sell their product; do they sell it to a commission man or to one man?

270 Mr. DIXON: No; very few of them sell to one man, who handles the cut of the mills. They sell largely to commission men, however, and to railroad purchasing agents direct.

Mr. TEAL: I wish you would explain to the Commission how the small men, who has not his own planers and cannot dry kiln his lumber, is up against it by reason of this San Francisco rate.

Mr. DIXON: I can best illustrate that by citing an instance with regard to one of our own mills, which had been a rough lumber mill until the last two or three months. We took our dry kiln and planer out, intending to make it a rough lumber mill, and shipped our rough side lumber, our No. 1 and No. 2 cut, to the California markets, thinking that we would never need the planer or a dry kiln there, for the reason that we had hardly any clear in the timber.

This spring, when the rate was changed, we found that we had no market for our rough lumber and had to put in a planer and a dry kiln again, at the expense of a good many thousands of dollars, in order to surface this lumber, and to ship at least a part of it to other points. The small mill men with whom I am familiar
271 and the mills in there without the planers simply have their accumulation of lumber on hand.

Mr. TEAL: Do those mills ordinarily saw to orders or standard lumber?

Mr. DIXON: Practically all the mills in Oregon cut to order. Pretty nearly all the Oregon pine is sawed to order.

Mr. TEAL: How about fir?

Mr. DIXON: When I say pine, I mean fir. That is the trade name. I meant to distinguish it from eastern Oregon pine, which is a real pine lumber, and is somewhat similar to the white pine.

Mr. TEAL: How much of the cut will be applied on orders and how much on side lumber?

Mr. DIXON: I have said that a sawyer was doing good work if he could get fifty per cent. of his lumber to apply on orders, on an average, and he would have a lot of side lumber left.

Mr. TEAL: That has to be marketed at some place?

Mr. DIXON: Yes sir.

Mr. TEAL: Where has been the market for the smaller mills for this side product that is not contracted for?

272 Mr. DIXON: It has largely gone into the California market, and into the San Francisco territory. In our case, some of it has been surfaced and forced into the eastern market.

Mr. TEAL: What about the smaller mills which have not planers and dry kilns?

Mr. DIXON: The small mills which have not planers are a good deal dependent on consumption in California for their markets, and the large consuming center there is San Francisco.

Commissioner PROUTY: Do your mills ship East?

Mr. DIXON: As a rule, they do not. You may say they do not

ship East at all. They do not ship any rough side lumber East, because it would not stand the freight rate. They do not ship some timbers, but a very small amount.

Mr. TEAL: Mr. Buehner has stated that, in his judgment, on cargo shipments to San Francisco the cargo shipper would be put to an additional cost of a dollar and a half, on an average, as against the rail shipper to those points. Will you explain to the Commission whether or not, in your opinion, that is too high; and if it is state what you think the proper amount is and why.

273 Mr. DIXON: I would not want to say what the proper difference should be; but if there is any, it seems to be to be markedly in favor of the cargo shipper, and for a number of reasons. One reason is that the cargoes, especially those shipped in Bay points, are what are called random cargoes. They do not call for any specific number or any specific size or length, but they do include just about the usual random stock that you would find in any lumber yard. I have seen a number of the charters and a number of the orders for cargoes, and in our yards it would amount to going right into the yard and taking everything you come to until you get a ship load.

Our car orders, as a rule, state so many pieces or so many feet of a certain size, and the different sizes and lengths. There would be fifty different sizes in a car. That is about the average, although I have seen seventy-five different items in one carload. There are always a dozen or so different items, with specific lengths, sizes and grades. It is unquestionably a great deal more expensive to go to work and sort out fifty carloads of lumber of twenty thousand feet each, and make each car fit a certain specification, than it is to load fifty carloads or one million feet into the hold of a schooner on a dock.

Commissioner PROUTY: That is undoubtedly so; but could you not get a better price for the lumber which you sent by carload than you get for that which you send in the schooner, for the very reason that it costs you more to put it on the car and get it there?

Mr. DIXON: The fact that it costs more to put it on the car, does not make it worth any more to the consumer.

Commissioner PROUTY: One witness testified that he had sold ten million feet in San Francisco for eight to ten dollars a thousand feet at the mill, and he made that low price because he got a sale for so large a quantity of lumber. Could you not, as mill men, get a much better price if you delivered a man just what lumber he wanted than you could if you sold him a whole cargo or a million feet, just as you take it from your yard?

Mr. DIXON: If we could deliver him the lumber just as he wanted it, we could get a somewhat better price; but the advantage of 275 which I was going to speak, in loading the schooner, is that the schooner is there and getable and they can load it. Of course, that brings in the question of car shortage.

Mr. TEAL: What does the dollar and a half extra charge at San Francisco cover; is it some sort of an unloading charge?

Commissioner PROUTY: I do not think he claims this to be any such charge as that; but he claims that the advantage to the carload

shipper is because he can meet the necessities of his customers. There are certain charges at San Francisco. The lumber has to be taken from the dock and brought into the yard, and it has to be taken and loaded on to the car; but still the great advantage is in being able to supply this customer with exactly what he wants.

Mr. DIXON: I have had a great deal of experience in selling in the San Francisco market and have sold some random stock, similar to what is loaded on schooners. So far as my memory goes, whenever I have sold random material, I have had to meet the cargo price.

Commissioner PROUTY: Was not the cargo price lower than your carload price?

Mr. DIXON: Not when I sold randoms. When, for instance, I sell one hundred thousand feet of one inch stock, without any specification as to size or length, the same as a schooner cargo, I have always had to meet the the cargo price, with the exception probably of fifty cents a thousand feet. I do not think there has ever been any more difference than that. When we do sell a cargo of specified sizes and lengths, we get more money than the cargo shipper gets for his random cargo; but in my opinion no more than he would get for a load of specified sizes and lengths, which would correspond to our carloads.

Commissioner PROUTY: Do you know anything about how much standing lumber is in Willamette Valley at the present time?

Mr. DIXON: I know approximately what there is in western Oregon, from the Government reports only.

Commissioner PROUTY: Is there not a good deal in the Willamette Valley?

Mr. DIXON: There is in the tributaries to the Valley. In the Valley itself there is, of course, very little; but on the edge of the Valley and on the slope on each side, there is a very large growth of standing timber.

277 Commissioner PROUTY: As that timber is logged and cut up at the present time, is it worked up pretty closely or is a great deal of it wasted?

Mr. DIXON: That varies with the market. At the present time—and I am speaking now of the time before conditions changed, say three months ago—we are working up our timber much closer than we did at any other period, since I have been familiar with the operations.

Commissioner PROUTY: What effect will be produced on your business if this San Francisco rate should be restored and your eastern rate would be withdrawn, or there should be given a five cent arbitrary above Portland?

Mr. DIXON: Our statement shows the proportion of our eastern shipments, and any arbitrary against that would decrease those shipments. I would suppose that a five cent arbitrary would result in decreasing our operations at least one-half. The opening of the San Francisco market, on the other hand, if cars were furnished, would result in our marketing our low-grade product which we have been accumulating for the last year, and would probably take care

of a low grade product from our operations, at one-half of the present rate.

278 Commissioner PROUTY: Would a rate of say four dollars a ton do you any good in the San Francisco market, as against cargo rates?

Mr. DIXON: At the present time it would not.

Commissioner PROUTY: At the present time there is no market for lumber, anyway; is there?

Mr. DIXON: I do not mean to take an extreme. With prices normally low, it would not because it would leave a dollar and a half against us. I just figured it at ninety cents, and we would not be able to absorb a dollar and a half on our common lumber to anybody.

Commissioner PROUTY: How much does stumpage sell for in Willamette Valley at the present time, when people buy it?

Mr. DIXON: I think the real price is about one dollar a thousand.

Commissioner PROUTY: And you charge yourself fifty cents stumpage?

Mr. DIXON: Yes sir.

Commissioner PROUTY: Do you think on that basis you could not sell lumber profitably in San Francisco under a four dollar rate?

Mr. DIXON: I am considering now the average normal
279 conditions for the last three or four years; and I would say no.

Cross-examination:

Mr. COTTON: Mr. Dixon, I would like to have considered in evidence the cost prices which you prepared for 1905 and 1906 in the eastern case. I understand they cover your production, no matter where the lumber goes.

Mr. DIXON: That is correct; yes sir.

Mr. COTTON: That did not relate simply to the eastern production?

Mr. DIXON: No; that was our average cost.

Commissioner PROUTY: I think that in discussing this case you should be allowed to refer to any testimony that was taken in the other case.

Mr. COTTON: The only difficulty about that is that I do not want to go into the matter of earnings in this case, because that will prolong the hearing indefinitely.

Mr. TEAL: The earnings about what?

Mr. COTTON: I do not want to waste too much time on this proposition, because I think this is a case of purely competitive conditions.

280 Commissioner PROUTY: It is a case of purely competitive conditions so far as this rate is concerned; but when it comes to saying whether you should be permitted to make that rate, then it becomes a question of cost to a certain extent; would it not?

Mr. COTTON: Then we may have to take sometime and go into the question of cost. I merely want to know what the issues are, before we close our evidence.

Commissioner PROUTY: It has occurred to me that if you had made this rate and maintained it for a long time and should continue to maintain it with a reasonable profit, you might be obliged to do so; whereas you ought not to be required to maintain it if you made practically nothing out of the business. In other words, it would make a difference, in my opinion, as to whether this was a fairly good business on the \$3.10 or the \$4 or \$5 rate, or whether there was no money in it at all.

Mr. COTTON: These mills are located down in the vicinity of Eugene; are they not?

Mr. DIXON: Yes sir.

Mr. COTTON: The Coburg and Saginaw mills?

Mr. DIXON: Yes sir.

281 Mr. COTTON: You say there are how many mills doing business in the Willamette Valley, and are they members of your Association?

Mr. DIXON: No; they are not members of our Association; but they are mills whose names appear on the lists we have prepared, and are operating within the confines of the Willamette Valley.

Mr. COTTON: They are all practically north of you?

Mr. DIXON: The bulk of them are north of us.

Mr. COTTON: And they are more poorly situated so far as you are concerned. How many of them are there in the valley?

Mr. DIXON: About 250.

Mr. COTTON: I have a list you prepared in August, 1906, which only shows 92.

Mr. DIXON: Who prepared it?

Mr. COTTON: It is supposed to be a list of the shingle mills that were really doing business with the railroads, and it only shows 92 mills in this \$3.10 district when you think there are 250 now.

Commissioner PROUTY: Does that include both lumber and shingle mills?

282 Mr. DIXON: I can give you the names of 250 mills in the Willamette Valley.

Mr. COTTON: And their addresses?

Mr. DIXON: Yes; although I will not be sure about their post-office addresses.

Mr. COTTON: I would like to have the names of the mills and the nearest shipping point. You have a list of that kind already made; have you not?

Mr. DIXON: Yes sir.

Mr. COTTON: I do not want a man to take the time to write out 250 names; but if you have it will you file it?

Mr. DIXON: I have it.

Mr. COTTON: Then we will file it. Now about the capacity of these 250 mills. They only cut about four or five times as much as your three mills; do they not?

Mr. DIXON: Their average capacity is about seventeen thousand feet to the mill, and I do not know how many of them it would take to cut as much as we do; but you can figure that out.

Commissioner PROUTY: When you seventeen thousand feet, you mean seventeen thousand feet in ten hours?

Mr. DIXON: Yes; and a great many of them are small mills.

283 Mr. COTTON: The very great majority of them are small mills?

Mr. DIXON: Yes sir.

Mr. COTTON: How many of them do you think would run less than thirty thousand per day?

Mr. DIXON: The list will show that exactly.

Mr. COTTON: Have you got a capacity list?

Mr. DIXON: Yes; that is why we got it.

Mr. COTTON: They are all north of you?

Mr. DIXON: No; there are a good many of them south of us.

Mr. COTTON: But in the Valley?

Mr. DIXON: In the Valley—all these 250.

Mr. COTTON: But a large majority of the 250 are north of you?

Mr. DIXON: Yes; I think the majority of them are north of us.

Mr. COTTON: There are two hundred at least north of you?

Mr. DIXON: No; not that many. Nothing like that many.

Mr. COTTON: About how many are north of you?

Mr. DIXON: The list also shows that. They are divided
284 up by counties in that list, and I should prefer not to testify about it, as I have never taken the pains to verify it.

Mr. COTTON: Can these men live and pay a higher rate than you pay to San Francisco?

Mr. DIXON: Do you mean as much higher a rate as this difference?

Mr. COTTON: No; say ten cents a thousand or five cents a thousand.

Mr. DIXON: Why, I presume they could. I don't think ten cents a thousand would stop them from living.

Mr. COTTON: Would ten cents a hundred pound stop them from living?

Mr. DIXON: It would stop them from selling lumber at a profit, if I am correctly advised about the cost and the selling price.

Mr. COTTON: Then you think that if they had to pay ten cents per hundred, they would have to go out of business?

Mr. DIXON: They would have to go out of business in the San Francisco market, I should think.

Mr. COTTON: A majority of these small men have no other market except San Francisco and the local market?

285 Mr. DIXON: For their low grade side lumber.

Mr. COTTON: The large majority of these little fellows do no business at all with us.

Mr. DIXON: No; I think the majority of the smaller mills do not.

Mr. COTTON: So if you made a graded rate from Portland down to San Francisco, and that varied ten cents a hundred pounds, practically all the mills that would have to pay the ten cents higher rate than you would, would have to quit?

Mr. DIXON: What do you mean by a graded rate—getting less as you go south?

Mr. COTTON: Yes; I mean anything other than a blanket rate.

Mr. DIXON: Well, I think it would work a very great hardship to the mills that would have to pay the ten cents extra.

Mr. COTTON: It would mean three dollars to the thousand feet, and if you cannot do business under it these little fellows are not situated so that they can stand any more than you could stand.

Mr. DIXON: We can probably do business; but we would
286 have to restrict our output, and instead of running four mills, run one. If they could cut down their output so as to only fill the local consumption, they might manage to wiggle along.

Mr. COTTON: With a graded rate they would have to take care of their little local consumption out in the woods, which practically means to use a team and haul lumber for a few farmers.

Mr. DIXON: That varies with the situation and conditions.

Mr. COTTON: I am now talking about these small people and not these larger ones. I am talking about these two hundred men that we have in our minds most of the time.

Mr. DIXON: Under a graded rate to San Francisco, these small mills would either have to reduce their cost of operation or enlarge their market in some way. I don't know what they could do; but I am pretty well satisfied as to what we can.

Mr. COTTON: You know as a matter of fact, do you not, that Mr. Miles and Mr. Buehner and Mr. Poulsen can do very much better than they can on any such rate, and that none of these men could
287 compete as against you on the one hand or as against Poulsen on the other. They do not compete with you now on an even basis, do they? They labor under disadvantages, do they not?

Mr. DIXON: Some of them manufacture cheaper than we do; but I think as a rule their lumber is not quite so well manufactured.

Mr. COTTON: Some of the stuff that you buy from some of these small mills you could hardly nail together?

Mr. DIXON: I would not say anything of that kind.

Mr. COTTON: They do run very irregularly. Now suppose we met water competition at Portland and then grade it up, and undertook to take the lumber out in that direction on anything other than a blanket rate, which went all the way down, the little boys would have to stop; would they not?

Mr. DIXON: Do you mean that you ship lumber via Portland?

Mr. COTTON: Yes; if we met water competition from Portland and then based Portland to San Francisco, to go out by rail, and based Portland to meet the water competition rate——

Mr. DIXON: And add the local?

Mr. COTTON: What is the local rate on lumber from Salem in?

Mr. DIXON: I think it is four cents, if I remember cor-
288 rectly. Mr. Miles can tell you about that.

Mr. COTTON: If we should make the water competition rate at Portland and then grade it up, and this Commission should

sustain even a five cent rate, these little boys would suffer a very great hardship.

Mr. DIXON: It would work a very great hardship to them; but you cannot tell what a man can stand until you put him to the test. Some of them might manage to get along where others could not.

Mr. COTTON: I entirely agree with you in that remark, because I think we are all making more of a hardship out of this matter than, possibly, is necessary. It is true that all of these small mill men have got to be placed on an equality, from one end of the valley to the other, with you on the one side, and Miles, Buchner and Poulsen on the other, in order that they may have even a half way chance to live. Is not that right?

Mr. DIXON: They all need the same rate to the same points, in my judgment, in order to have a fair chance to do business.

Mr. COTTON: So that really, in order to enable the Willamette Valley to do a lumber business, there ought to be a blanket
289 both west and east, in practically that whole territory where we have made a blanket. Is not that about right?

Mr. DIXON: Well, we are used to working under the rates that have been in effect, and we have not been able to find out how to do without them. If there is any other way, I do not know it. You can call it a blanket or anything else you please.

Mr. COTTON: Take the case of Mr. Miles. As I understand it, he pays more for his timber than you pay.

Mr. DIXON: I do not know.

Mr. COTTON: I understand from his testimony that he did. He is located at Salem, which is on the main line of the Southern Pacific. Then he has a mill out here at Dallas, which is over here on a branch, on this extreme west side. He gets his lumber out on what we call the West Side Road.

Mr. DIXON: I think so; I have never been to Dallas, but that is my understanding of it.

Mr. COTTON: This road has a comparatively small tonnage.

Mr. DIXON: I could not say as to that.

Mr. COTTON: Suppose that on the eastern stuff he had to
290 pay more than he does, to the extent of five or ten cents a hundred pounds, could he live?

Mr. DIXON: I do not think the question of his living would enter into it; but he could not operate properly. He would be at a disadvantage.

Mr. COTTON: He is away over here on this Corvallis line, on this branch line of the Southern Pacific, and in order to get over to the main line he has got to have his lumber hauled over to Albany, and then down past your place to Eugene.

Mr. DIXON: Yes.

Mr. COTTON: And if he were charged five or ten cents more on his San Francisco business, he could not compete with you in San Francisco; could he?

Mr. DIXON: He could not get the same results. I do not know whether he could compete or not.

Mr. COTTON: Do you think that he could compete?

Mr. DIXON: I understand that he does have a slight differential there now, and he is competing with us. I think he pays a somewhat higher rate than we do.

Mr. COTTON: You mean to San Francisco?

Mr. DIXON: I think so.

Mr. COTTON: It is marked as within the territory.

Commissioner PROUTY: Is there not a twenty-five cent
291 differential on the west side?

Mr. MILLER: The rate is just the same for all of that territory.

Commissioner PROUTY: It is now, but when the \$3.10 rate was in effect, was there not a 25 cent differential on the west side?

Mr. MILLER: The rate on the west side was 25 cents per ton higher.

Mr. COTTON: If he paid five or ten cents per hundred pounds more than you do, he could not compete with you, because his lumber is no better than yours; is it?

Mr. DIXON: I think it is about the same.

Mr. COTTON: The evidence shows that his stumpage costs him more. Now, Mr. Dixon, do you not think that it is an advantage to keep all these mills in operation and have blankets both ways, rather than to have graded rates both ways?

Mr. DIXON: As far as our mills are concerned, it is always to our disadvantage if we have a higher rate than a competitor, whether it is a blanket rate or any other charge against us.

Mr. COTTON: In the way the rate situation is adjusted now,
292 everybody who is manufacturing lumber south of Portland has got practically the same rate to every point and place in the United States that anybody else can reach. That is, all of the miles south of Portland have the same rate which the other has east and west.

Mr. DIXON: That is, the mills in Oregon, south of Portland, have the same rate to every place they can reach.

Mr. COTTON: Yes.

Mr. DIXON: I think that is true, except for the differentials that have been introduced. We have an arbitrary from one of our mills.

Mr. COTTON: That is practically a logging road and was built into your territory to accommodate this especial purchase of lumber.

Mr. DIXON: There never have been any logs hauled on the road.

Mr. COTTON: It was built for the purpose of cutting and handling your timber.

Mr. DIXON: I think so.

Mr. COTTON: And if that road had not been built, you would have to build one in order to operate the Wendley Mill at all;
293 would you not?

Mr. DIXON: We would have had to have a road.

Mr. COTTON: Do you think you could change that system by establishing anything but a blanket rate without putting a very great burden upon all these mills that are in between Portland and your mills?

Mr. DIXON: I think that any change in the rates would put at a

disadvantage that mill which had the highest rate at that point, if they were shipping by rail.

Mr. COTTON: All of these 250 odd mills in this Valley are rail shippers; are they not?

Mr. DIXON: I think perhaps there are some of those mills that do not ship much by rail; but my impression is that the large majority of them do have access to rail shipments.

Mr. COTTON: They have no other method of shipment except by rail?

Mr. DIXON: Practically none. There are some of them around Salem that ship a little by barge, but none of any consequence.

Mr. COTTON: They barge into what point?

Mr. DIXON: I do not know. I have just seen some barges
294 in the river there at Salem which I understood were prepared for lumber shipments.

Mr. COTTON: Then they pay the barge rate, in addition to the Portland rate?

Mr. DIXON: I do not know the method of shipment, or if there is any shipped by water.

Mr. COTTON: It would follow, as a matter of fact, that if the \$3.10 rate, or any lower rate than the barge rate was established, that it ought to be extended all the way up to Portland; would it not?

Mr. DIXON: Personally I have no objection to that; but I do not see that it would necessarily follow.

Mr. COTTON: I am not considering your standpoint. I merely want your best opinion with reference to the industry in western Oregon.

Mr. DIXON: I think, Mr. Cotton, that the arrangement in effect prior to April 18th was, from the standpoint of the lumber shippers, a fair arrangement.

Commissioner PROUTY: How can you justify leaving Portland out of the San Francisco rate and taking you into the eastern rate?

Mr. DIXON: The Portland mills have so much the advantage of us in almost every other branch of the business that I do
295 not see how it is unfair to them to give us what might appear to be a slight advantage in one particular. In other words, they have a better grade of logs, they have a better market and more markets, they have a place to dispose of their refuse, and, what counts for more than anything else and is absolutely necessary to the successful conduct of the lumber business, they can get rid of their output, while we cannot, up to date.

Mr. COTTON: Why can they get rid of their output and you cannot?

Mr. DIXON: Because they are located at a competitive point.

Mr. COTTON: In what way?

Mr. DIXON: They have access to two different lines of railroad, and in some cases I think perhaps three, although I am not familiar with the Great Northern tariff.

Mr. COTTON: None of those mills, as a matter of fact, ship out of Portland by the Northern Pacific; do they?

Mr. DIXON: They have the rate. I do not know whether they or not.

Mr. COTTON: You know, as a matter of fact, that there is not a mill in Portland which ships lumber east on the Northern Pacific, and has not for the last two years.

Mr. DIXON: No; I do not know that as a matter of fact.

Mr. COTTON: Do you not know that during the whole period of congestion, the Northern Pacific was not seeking for lumber at Portland, when they could not haul their own lumber out?

Mr. DIXON: I was under the impression that they did haul some lumber from there; but I am not positive about that. I never examined the record. I know they have a rate from there, and they have a rate into Idaho, and the large consuming territory of western Oregon and eastern Washington, which we do not have. I had a record of 2600 cars last year, which went into Idaho.

Mr. COTTON: Where did it come from?

Mr. DIXON: It went from Huntington, I think.

Mr. COTTON: Is there not lumber all up through the Blue Mountains?

Mr. DIXON: A great deal of it, to my knowledge, came from Portland, because I know of their shipping in there, and I think that in two or three instances they absorbed the differential and shipped a few cars in there.

Commissioner PROUTY: Mr. Cotton, I do not think we need to add any time on that point.

Mr. COTTON: But there is lumber in that region?

Mr. DIXON: There is no question about that; but there is some lumber goes from Portland into that territory.

Mr. COTTON: Do you know to what extent?

Mr. DIXON: No; I do not.

Mr. COTTON: It is very little; is it not?

Mr. DIXON: I thought it was rather a good market for them. I thought they consumed a few hundred carloads a year.

Mr. COTTON: Your idea is that this rate ought to be extended to the Willamette Valley points right up to Tualatin, and then break off and jump up higher—or is it your idea that Portland ought to be added to the same rate that you get?

Mr. DIXON: I have not attempted to analyze the situation from a fair standpoint. I told you my views from the standpoint of a lumber manufacturer in the Willamette Valley. As to the traffic out of it, I think the Commission is a better judge than I am.

Mr. COTTON: It ought to extend up to at least ten or twelve miles of Portland; should it not?

Mr. DIXON: If I were to draw the line there, feeling as I do at present, I would except the mills that have other outlet than the Northern Pacific. I think that is only a fair offset for the advantage they have in other markets.

Mr. COTTON: The only mills that have any other outlet are those which are located right in Portland. Is not that right?

Mr. DIXON: Is that a question?

Mr. COTTON: Yes.

Mr. DIXON: I think so.

Mr. COTTON: Then in order to prevent doing an injury to the mills in the Willamette Valley, any rate which is made for you should necessarily be made to within ten or twelve miles of Portland, at least?

Mr. DIXON: I would make a rate to include those mills that have no other outlet than the Southern Pacific.

Mr. COTTON: Will you answer my question? In order to prevent doing an injury to the mills in the Willamette Valley, the same rate which is given to you would have to be carried right up to the border of Portland, at least?

299 Mr. DIXON: I would apply it to the mills in the Willamette Valley.

Mr. COTTON: But in order to prevent injury to the mills in the Willamette Valley, it would have to be carried up nearly to Portland, at any rate?

Mr. DIXON: If it did not reach them all, it would injure those that were left out.

Mr. COTTON: And in order to prevent injury to the eastern shippers, any rate which we make from Portland ought to be extended south to all the mills in the Willamette Valley?

Mr. DIXON: I think we should be kept on the same parity with Portland that we were when we established our mills.

Commissioner PROUTY: You had no eastern rate when you established your mills.

Mr. DIXON: During the time when we had done most of our improvements in enlarging our mills, and I think from the time we built the first mill, we had an eastern rate.

Commissioner PROUTY: It was stated that you were only put on a parity with Portland in 1900 and 1901. Is that correct?

300 Mr. DIXON: That is when we had the same rate as Portland via Portland. But prior to that date we had a large territory in Arizona and Colorado. But that was taken away, the market was closed and the other given to us.

Mr. COTTON: Do you not ship into Arizona now?

Mr. DIXON: I do not think we ship five cars a year there.

Mr. COTTON: Or to Nevada?

Mr. DIXON: We have shipped quite a good deal into Nevada in the last year and a half I should say.

Mr. COTTON: You are not quite out of that market?

Mr. DIXON: Just now we are entirely out of it.

Mr. COTTON: Why?

Mr. DIXON: The charter rate is so low that they ship to the California coast points and use the local from there across, which is less than our through rate.

Mr. COTTON: That is due to market conditions on account of the charter rate?

Mr. DIXON: I think it is largely because the charter rate plus the local is less than our through rate.

Mr. COTTON: Do you think that we ought to go chasing after this

301 charter rate, or that it is better for this road to establish a fair price and keep it.

Mr. DIXON: I think that if the rail rate was fixed at about the average of the charter rate for the time that you have a record of it, it would be about the right thing.

Mr. COTTON: I asked you whether you think we ought to take some permanent position and stay there, rather than to keep chasing after the charter rate.

Mr. DIXON: I think the Commission ought to fix a rate and leave it.

Mr. COTTON: Last year, when the Portland mills were paying eight and nine dollars a thousand feet, your \$3.10 rate continued and you shipped quite largely under it; did you not?

Mr. DIXON: The rate continued; but we shipped very little.

Mr. COTTON: How many cars?

Mr. DIXON: During what period?

Mr. COTTON: In 1905, and up to the time that the rate was taken out, how many cars did you send South?

Mr. DIXON: That is all introduced in evidence. I have no figures now.

Mr. COTTON: You have not figured that?

302 Mr. DIXON: I did figure it and the stenographer has the evidence, I think.

Mr. TEAL: The complainants in this case have no objection whatever, if the Commission sees fit, to the granting of the prayer of the petition of intervention, for Portland to have the same rate. That has been out position all the time.

I will now call Mr. Miles.

B. C. MILES, a witness of lawful age, produced on behalf of the complainants, being duly sworn, testified as follows:

Mr. TEAL: The other testimony of Mr. Miles may be considered as in evidence.

Commissioner PROUTY: Yes.

Mr. TEAL: Mr. Miles, will you please state, if you know, to what extent the Valley lumber men own their own timber, and, within your knowledge, how they operate and the price they pay for stumpage?

Mr. MILES: Of course, that varies. The small mill men usually, if they can, will buy 40 or 80 or 160 acres of timber land and will put in a little mill and take the timber off.

Mr. TEAL: And the others buy considerable quantities?

303 Mr. MILES: The others buy in a large amount of timber and build their mills, and figure for operating more permanently.

Mr. TEAL: How are you situated?

Mr. MILES: We have purchased our own timber lands quite largely and have undertaken a plan for operating for a series of years.

Commissioner PROUTY: How much timber land do you own?

Mr. MILES: We have about sixteen thousand acres.

Commissioner PROUTY: Have you made any estimate as to the number of thousand feet it contains?

Mr. MILES: Approximately eight hundred million feet, as near as we can estimate it.

Commissioner PROUTY: How much do you cut per year?

Mr. MILES: We cut in 1907 about thirty-four million feet.

Mr. TEAL: That was during this year?

Mr. MILES: Yes; that is in ten months.

Mr. TEAL: About what has the common price of timber been for the last year or two, when it was being bought up for use,
304 sawed up and cut into lumber, in the section you are in?

Mr. MILES: I should say about one dollar a thousand.

Mr. TEAL: Where is the principal market for this rough side lumber?

Mr. MILES: The market is almost altogether in California.

Mr. TEAL: You heard Mr. Booth's testimony as to the effect upon the milling industry, unless the lumber can be marketed in San Francisco. What do you say as to that?

Mr. MILES: It is correct.

Mr. TEAL: What do you say as to whether that applies generally to the Willamette Valley?

Mr. MILES: I think it applies to practically all the mills in the Valley, especially the smaller mills in the Valley. I think it applies to them much more than to the larger ones.

Mr. TEAL: State briefly to the Commission the result of your last investment in the building of a mill, the amount of the investment, the time it took and what occurred at the time it was built.

Commissioner PROUTY: Unless there is something which
305 has a special bearing on this case, we ought not to take up the time with that.

Mr. TEAL: I thought we might show briefly that he started in to build a mill, and when this rate was *rate was* taken out in January, 1904, it was absolutely stopped. I think he would testify that he saw the Southern Pacific people and that the rate was restored—not because he saw them or anything of the kind. They encouraged him to go on with it and the rate was restored. They invested a great deal of money, but that is not important. I do not care to go into it unless the Commission wishes me to do so.

Commissioner PROUTY: That general fact is important; but not the fact that this individual member did that perhaps. He is not standing here asking us to enforce some contract with the Southern Pacific Road, and he is not asking that the Southern Pacific Road be estopped from putting in this rate as to him in particular. The simple question here is what is the fair thing to be done with reference to these mill owners.

Mr. TEAL: If the Commission does not object, and it is important enough, I would like to have him make that particular statement.

306 Commissioner PROUTY: You may briefly state it.

Mr. MILES: We had been logging up to 1903, and we had seen other mill men prosper, so we thought we would go into the lum-

ber business. We took in additional capital and made arrangements to build a mill there in 1903. Before we commenced our construction we found that this rate was uncertain, and we ceased our plans for work, although we had increased our capital. We did not commence the construction of the mill or do anything towards it, until after the rate was fixed in May, 1904, at which time we commenced the construction of the largest mill we have now, and since then we have purchased two other mills. Before that we had done nothing along that line.

Mr. TEAL: Do you know Mr. Coler?

Mr. MILES: I went personally to Mr. Coler and talked to him about the building of this mill at that point, and he came personally and looked over the ground and laid out the place where he thought we ought to put the mill. He encouraged us to go ahead and build the mill.

Commissioner PROUTY: Assuming that this water rate from Portland to San Francisco has advanced one dollar a thousand
307 feet, do you think that should prevent this railroad company from advancing your rate?

Mr. MILES: No sir; I do not think so. I based it on the competition we had there.

Commissioner PROUTY: You think they ought to give you a rate which would enable you to do business?

Mr. MILES: Yes sir.

Commissioner PROUTY: And if the conditions changed the rate might properly be changed to meet those conditions?

Mr. MILES: I should look at it in that way; yes sir.

Mr. TEAL: Did you have any orders cancelled from San Francisco, after this rate was changed?

Mr. MILES: We had about 110 carloads cancelled.

Mr. TEAL: How many orders have you received from San Francisco since this rate was changed?

Mr. MILES: None for the class of lumber upon which the rate was changed.

Mr. TEAL: Can you state how many carloads you have shipped to San Francisco since the rate was changed?

Mr. MILES: We have shipped four under that classification, which we had already received orders for, and we have shipped some of other grades.

308 Mr. TEAL: Would you state that that was substantially the effect upon all the mills in the Willamette Valley?

Mr. MILES: Yes sir.

Mr. ABEL: Your total cost for the production of lumber at Dallas, as compared with Portland, is about six and a half dollars a thousand upon all grades; that is the average cost, is it not?

Mr. MILES: No sir; it is more than that.

Mr. ABEL: What is it?

Mr. MILES: At Dallas we are very favorably situated, and we have a cheaper cost there than we have at the other mills.

Mr. ABEL: What is the cost at Dallas?

Mr. MILES: Without any stumpage, usually from eight dollars to eight dollars and an half.

Mr. ABEL: Your stumpage costs you how much?

Mr. MILES: About a dollar a thousand. We have just purchased it at that recently.

Mr. ABEL: You bought a great deal of stumpage at much less than that; did you not?

Mr. MILES: We did buy some.

Mr. ABEL: As low as twenty cents; did you not?

309 Mr. MILES: Not recently. The first purchase that we made perhaps did not cost more than that.

Cross-examination:

Mr. COTTON: Then you can log and make lumber at Dallas for \$9.50, all grades?

Mr. MILES: At that particular point we can; yes sir. That is we can make cheap lumber. We have another mill where it costs us approximately \$13 a thousand.

Mr. COTTON: How much do you cut at Newberg?

Mr. MILES: We cut about eighteen million feet.

Mr. COTTON: How much do you cut at Dallas?

Mr. MILES: About six million feet.

Mr. COTTON: Your Newberg mill is situated on what is known as the Jefferson Short Line?

Mr. MILES: Yes sir.

Mr. COTTON: I wish you would tell the Commission how your Newberg mill lumber gets out of the State of Washington, going south.

Mr. MILES: Going to California?

Mr. COTTON: Yes sir; and go slow please.

310 Mr. MILES: It goes over the Southern Pacific around to Corvallis, and from there to Albany, to the main line, and then south over the Southern Pacific.

Mr. COTTON: That is on account of the recent acquisition of the Corvallis eastern. Did it always go that way?

Mr. MILES: I think it has nearly always gone that way.

Mr. COTTON: Did you pay this differential of twenty-five cents?

Mr. MILES: Yes sir; we did.

Mr. COTTON: You say you were logging up to 1903?

Mr. MILES: Yes sir; and we were before that.

Mr. COTTON: Did you own any timber up to that time?

Mr. MILES: Yes sir.

Mr. COTTON: You bought some of this timber up there at a dollar a thousand? How much higher freight rate, if any, can you stand on California shipments than Booth-Kelly?

Mr. MILES: I don't know that we can stand any.

Mr. COTTON: Your cost is really higher than theirs; is it not?

Mr. MILES: Yes sir.

311 Mr. COTTON: All of these new mills in the Valley, in the last few years, have bought the timber at a higher price than theirs?

Mr. MILES: I do not know about that. I suppose so though, on an average.

Mr. COTTON: It is generally known that their timber costs them less than any other mill in the State of Oregon. Is not that right?

Mr. MILES: I don't know, Mr. Cotton.

Mr. COTTON: Have there been many new mills started up in that territory?

Mr. MILES: Yes sir.

Mr. COTTON: In the last two or three years?

Mr. MILES: Yes sir.

Mr. COTTON: Has that been due to the fact that there has been an increased demand for Oregon fir?

Mr. MILES: Yes; I think that taking our immediate neighborhood there have been at least eight or ten mills built for the purpose, primarily, of filling contracts for your people. They take a contract for a certain amount, and then they figure on marketing their side cut at a price that will make them a little margin.

Mr. COTTON: Some of those ties are for eastern shipment?

Mr. MILES: Most of those ties are for your company.

312 Mr. COTTON: And for the Union Pacific?

Mr. MILES: I think not. I think most of them are for the Southern Pacific. I know of two mills that are closed down to-day that have contracts at a fair price, but they couldn't market their side cut, and for that reason they are not running.

Mr. COTTON: Do you know whether those men paid a good price for their timber?

Mr. MILES: I think they paid about fifty cents to a dollar.

Mr. COTTON: And therefore they would labor under a disadvantage if they had to pay a higher freight rate than Booth-Kelly to the South?

Mr. MILES: Yes.

Mr. COTTON: Do you think you gentlemen in the neighborhood of Newberg and Salem could pay a higher rate on stuff to the East, than the Portland mills?

Mr. MILES: No; we cannot.

Mr. COTTON: Then in this middle territory of Newberg, Salem and Dallas, in which you operate, it is necessary, in order that you may continue in business and that others similarly situated may
313 continue in business, that the blanket rates should practically continue as they exist now, both east and west?

Mr. MILES: I should say not as they exist now, but as they did exist when we built our mill.

Mr. COTTON: I am referring to blanket rates.

Mr. MILES: Yes; I think they are preferable.

Mr. COTTON: You cannot get along very well without the eastern market or the California market?

Mr. MILES: Not very well, no sir. It is hard to market all our product in any one place.

Mr. COTTON: You could not market your product in any place if you paid a higher rate than Booth-Kelly to the south and a higher rate than Portland to the east, without a considerable loss to yourself; could you?

Mr. MILES: No; I don't hardly think so.

Mr. COTTON: And you think that is fairly typical of most of the mills in the Willamette Valley?

Mr. MILES: I think the man who has to pay the higher rate is certainly at a disadvantage.

Mr. COTTON: I mean on account of the price they pay for their timber and on account of the situation.

314 Mr. MILES: There may be certain cases where a man could operate, if he has a particularly cheap place.

Mr. COTTON: Of the 150 mills operating in the Willamette Valley, south of Portland, their situation is such that they are small producers?

Mr. MILES: Yes; quite generally.

Mr. COTTON: Their machinery is certainly not any better than that of the large mills?

Mr. MILES: No; but I think the majority of them operate for less per thousand feet than the larger mills; just as we operate at Dallas for a lower price than we do at Newberg.

Mr. COTTON: Then you think these larger mills pay more money for manufacture?

Mr. MILES: I think, as a rule, the average cost is more in the larger mills than in the smaller mills.

Mr. COTTON: But they do not make as much high-grade stuff; do they?

Mr. MILES: No.

Mr. COTTON: The profit in logging and in lumber in the Willamette Valley is largely in high-grade stuff, is it not?

Mr. MILES: Yes sir.

315 Mr. COTTON: And the main difficulty for everybody is to get rid of the common lumber?

Mr. MILES: Yes sir; that has usually been the difficulty.

Mr. COTTON: There is no real difficulty about getting rid of your high-grade stuff, even on the present rate?

Mr. MILES: There has been. We have quite an accumulation of fairly good stuff.

Mr. COTTON: I mean of course if it had not been for this slump, financial and otherwise, which has taken place.

Mr. MILES: It is easier to dispose of that than it is of the common.

Mr. COTTON: That is all I have to ask.

Mr. TEAL: In view of the fact that it has been agreed that the other testimony may be applicable to this case, I will not introduce any more witnesses. I desire, however, to introduce some record testimony.

I wish to have copied in the record the directions to agents of the Southern Pacific Railroad Company, dated July 31, 1903, issued by

316 Mr. W. E. Coman, General Freight Agent of the Southern Pacific Company, and I call particular attention to the fact that, in that statement, he fixes the water rate at that time and says:

"And as the rate by water from Portland is to-day five dollars per thousand feet, on all classes of lumber, the advance to five dollars

per ton on kiln dried machined lumber, still maintains the rate on the water basis."

Mr. COTTON: It all goes in; does it not?

Mr. TEAL: Yes.

Commissioner PROUTY: Do you understand that this also shows that the rate per ton by rail should be the same as the rate per ton by water? Do you understand that the railroad company has at any time admitted or claimed that the rate per ton should be the same as the water rate per ton?

Mr. TEAL: No; they simply maintained the parity. They would be out of business if they did that. He says here:

"This class of lumber averages about one ton weight per thousand feet, and as the rate by water from Portland is to-day five dollars per thousand feet, on all classes of lumber, the advance to five dollars per ton on kiln dried machined lumber, still maintains the
317 rate on the water basis."

Commissioner PROUTY: Was not the rate advanced five dollars per ton at that time, on all lumber?

Mr. TEAL: Yes—

Commissioner PROUTY: That may be copied into the record.

(The above mentioned directions to agents of the Southern Pacific Company, are in the words and figures following, to wit:)

PORTLAND, July 31st, 1903.

To Agents:

Effective August 20th, the present rates of \$3.10 and \$3.50 per ton on lumber, etc., carloads, from Portland and Oregon points, Glendale and North, to San Francisco, Oakland, Sacramento, Stockton and other California points, as specified in tariffs, will be advanced to \$5 per ton from Portland, on lumber, lath and fence posts, straight or mixed carloads while from points specified south of Portland, the present rates will remain — effect, with the exception that on kiln
318 dried "machined" lumber the rate will be advanced to \$5 per ton, same as from Portland. This class of lumber averages about one ton weight per thousand feet, and as the rate by water from Portland is to-day \$5.00 per thousand feet on all classes of lumber, the advance to \$5.00 per ton on kiln dried "machined" lumber, still maintains the rate on the water basis.

"The rates to interior California points, not specified above, will not be advanced, except that \$5.00 per ton will be the minimum in all classes from Portland, and all kiln dried "machined" lumber, from points south of Portland. Exception—Rates from Portland to points on the Central Pacific, East of Roseville Junc., will be advanced to sum of locals on Roseville Junc., the Corinne, Utah, rate of \$5.00 per ton to be observed as the maximum. The rates to those points from stations indicated South of Portland, will not be advanced.

"Rates from Portland will also be advanced as follows: Piling and Poles, straight carloads; Box Shooks, straight carloads or mixed with shingles, lumber, lath or fence posts, \$6.00 per ton. No advance will be made in these rates from points South of Portland.

319 "Copies of the tariff will be sent you within a few days, but this advance notice is furnished in order that you may promptly advise all of your shippers, so there will be no misunderstanding, as no exception will be made after August 20th, when the change will become effective.

Please acknowledge receipt and say if understood.

Yours truly,

W. E. COMAN, *G. F. A.*"

W. E. C.—S.

Mr. TEAL: I would also like to have copied into the record Circular F-70, issued May 4th, 1904, by W. E. Coman, General Freight Agent of the Southern Pacific Road, and also Joint Circular No. GFD—F-73, dated May 10th, 1904.

Commissioner PROUTY: They may be inserted into the record.

(The above mentioned circulars are in the words and figures following, to wit):

"PORTLAND, OREGON, *May 4th*, 1904.

320

Circular No. F-70.

To agents:

File 136-E. Referring to Circular No. F-68 of April 21st, advance notice of changes in lumber rates to California points, effective May 10th. The tariff will be mailed to you shortly, but to enable you to explain fully to your shippers, and others interested in the re-adjustment, at the earliest possible moment, all changes are shown below:

Green Common Rough Fir Lath and Lumber Only.

(Straight or Mixed Carloads.)

To

San Francisco, San Francisco (Vallejo St.) Alameda, Oakland (Market Street), Oakland, (Adams Wharf), Oakland Wharf, Oakland (16th St.), Stock Yards, West Berkeley, San Pablo, Hercules, Vallejo Junction, South Vallejo, Port Costa, Benicia, Martinez, Peyton, Bay Point, Cornwall, Antioch, only.

From

Albany, Glendale, and points between, including points on Woodburn-Springfield Branch, Tallman and South, also Lebanon Branch..... \$3.10 per ton.

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Airlie, Tualatin, and points between, including Sheridan Branch, on Yamhill Division; also Corvallis, Beaverton, and points between on West Side Division \$3.35 per ton.

"This restores on green common rough fir lath and lumber only, straight or mixed carloads, the rates of \$3.10 and \$3.35 per ton which were in effect from points South of Portland prior to January 1st, 1904.

"The above rates cannot be used as basing rates, but through rates will be published to the points in California where the local rate from San Francisco, added to the above rates, makes lower than \$5.00 per ton, and rates to such points will be published in each case as shown below.

"From Portland, East Portland, Glendale and points between on East Side Main line, including points on Woodburn-Springfield Branch, Tallman and South, and Lebanon Branch, to points named below:

(Rates shown below will not apply as intermediate, but only to and from points specified.)

Green Common rough Fir Lath and Lumber only, Straight or Mixed Carloads.

322

East Oakland	\$3.60	San Leandro	\$3.70
Sather	3.60	Lorenzo	3.70
Heywood	3.70	Alvarado (BG)	3.70
Locoto	4.10	Lothrop	4.30
Stockton	4.30	Lodi	4.50
Mockeford	4.90	Clement	4.90
Wallace	4.90	Valley Springs	4.90
Acempo	4.50	Galt	4.70
Suisun	4.40	Cordella	4.60
Napa Junction	4.30	Shellville Jet.	4.50
El Vorado	4.90	Kenwood	4.90
Santa Rose	4.90	Niles	4.10
Irvington	4.10	Warm Springs	4.10
Milpitas	4.10	San José	3.70
Sunol	4.30	Pleasanton	4.50
Napa	4.30	Yountville	4.80
Elmira	4.40	Vacaville	4.40
Peters	4.30	Milton	4.90
Farmington	4.30	Oakdale	4.90
Waterford	4.90	Ripon	4.75
Modesto	4.90	Ocean View	3.55
Colma	3.55	So. San Fran.	3.55
Milbrae	3.55	Burlingame	3.55

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Livermore	4.70	Concord	4.50
Walnut Creek	4.90	Brentwood	4.30
Byron	4.30	Bethany	4.30
Tracy	4.30	San Mateo	3.55
Belmont	3.55	San Carlos	3.55
Redwood	3.55	Menlo Park	3.55
Palo Alto	3.55	Mayfield	3.55
Mt. View	3.70	Lawrence	3.70
Santa Clara	3.70	Coyote	4.45
Morganhill	4.45	Hollister	4.90
Santa Cruz	4.90	Monterey	4.90
Campbell	4.30	Los Gatos	4.30

"From Portland (Jefferson Street) and all points on West Side and Yamhill Divisions, including Sheridan Branch, to the above named points only, add to rates shown 25 cents per ton when same does not exceed \$5.00 per ton.

"With the exception of the changes in the rates on green common rough fir lath and lumber only, straight or mixed carloads, as noted above, the present rates as named in Amendments 84 and 91 to Lumber Specials No. 1, applying from points in Oregon, 324 will continue in effect.

W. E. COMAN,
General Freight Agent."

(Cir. No. 70, p. 2)"

"PORTLAND, OREGON, May 10, 1904.

Joint Circular No. GFD—F-73.

To agents and conductors:

File No. 136-E. Referring to Circular No. F-71 of May 4th, 1904, issued by General Freight Office, instructions as to way-billing and designating green common rough fir lumber and other lumber.

"Agents and Conductors will, when receiving orders from shippers for cars to load with lumber, for points to which lower rates apply on green common rough fir, request shippers to specify whether shipment consists of such lumber, or lumber N. O. S., and if former is designated, have it understood with shipper that flat car will be furnished, if available. This low class lumber can be shipped in flat car equipment, in all cases to advantage, and should shipper 325 object to such equipment, special effort must be made to check such shipment, for assurance that nothing but the class of lumber entitled to the lower rate is loaded.

"When actual check of the contents of all cars billed as green common rough fir cannot be obtained, way-bills must bear notation "Shipment not inspected; Agent at destination will check, and assess proper charges.

W. E. COMAN,
General Freight Agent.

L. R. FIELDS,
Superintendent."

Mr. TEAL: In connection with such evidence as I may desire to refer to in my brief, as to the business done by these companies, I would like to have considered as offered in evidence the copies of the official reports filed in the Interstate Commerce Commission.

Mr. COTTON: By what company?

Mr. TEAL: By the Oregon & California Railroad Company, if it has been filed, and if not that of the Southern Pacific.

Mr. COTTON: The Oregon & California filed their report.

326 Commissioner PROUTY: What is the Oregon & California Company?

Mr. COTTON: It is a leased road.

Commissioner PROUTY: And extends from where to where?

Mr. COTTON: It extends from Portland to the top of the mountain, that is to the California & Oregon State line.

Commissioner PROUTY: The Southern Pacific operates the Road?

Mr. COTTON: Yes; it is a leased line.

Mr. TEAL: The Southern Pacific owns practically all of the stock; does it not?

Mr. COTTON: I do not know anything about that.

Mr. TEAL: I think it is so admitted in the answer.

I also desire to have considered in evidence, as we did in the other case, the annual report to the stockholders of the Southern Pacific, for the period commencing in 1897 and ending June 30, 1907, the date we filed a request with the defendant and asked for certain information to be furnished for this hearing. I would like to ask if any of that information has been prepared and is to be furnished. I will read what it is:

327 "A statement showing annual gross and net earnings of each defendant from the movement of all lumber, shingles and other forest products for the fiscal years 1900 to and including the year ending June 30, 1907, and to the final hearing of this cause."

Commissioner PROUTY: Do you mean the revenues from the movement of lumber and shingles, and forest products, on all points on the Southern Pacific?

Mr. TEAL: No sir.

Mr. COTTON: Yes sir; it relates to all parts of the road. I told Mr. Teal's clerk, when this copy was served on me, that I did not intend to furnish that unless requested so to do by the Commission.

Commissioner PROUTY: We ought to have, if it can be furnished, a statement showing the earnings from the movement of lumber on this railroad in question, from Portland to San Francisco.

Mr. COTTON: I asked him whether he was willing to restrict it, and he said no; that that was what Mr. Teal had instructed him to serve. I then told him he could notify Mr. Teal that it would not be produced.

Mr. TEAL: Then I would like to ask for the gross earnings for this road for lumber and forest products through Ashland, from the year 1898 to 1907.

Mr. DILLARD: I have received a letter from Mr. Herrin, accompanied by the affidavit of Mr. Hasborough which I thought I had with me. I find that in changing my papers in the case I left it at the hotel. Mr. Teal's request was referred to him and he went to work to see what he could get out of it. There was a great deal of it that could not be furnished. He started to work in good faith to get what he could of it, but he found that it was utterly impossible because he had not received the notice until the 4th day of December, and in addition to that to comply with the request in full would take quite a number of experts and cost something like four or five thousand dollars. They would have to get the way bills of each and all the conductors—

Mr. COTTON: It covers the entire Southern Pacific system.

Commissioner PROUTY: We do not want that; but it seems to me that this Commission ought to know, before it passes on this question, substantially what your earnings are on this railroad.

Mr. COTTON: There is no objection to that at all.

329 Commissioner PROUTY: What your train mileage cost is, for example, on this railroad and what your earnings for a specified period under the \$3.10 rate were from lumber on this railroad, and other general facts of that sort, so as to give us some general idea as to what it costs to operate trains on this line between Portland and San Francisco.

Mr. DILLARD: I want to say with regard to that, that this was a part of the information I desired to bring before the Commission myself; but the time allowed between the filing of the bill and the hearing of the case was so short that I could not get a part of it, even for my own use here. As far as we can, we will be glad to comply with your request.

Commissioner PROUTY: Let us see what information Mr. Teal is asking for and then perhaps we can agree upon what should be furnished.

Mr. TEAL: The next one is: "A statement by each of said lines showing the number of cars applied for during the years 1906 and 1907 to each of the said defendants for cars for the shipment of lumber, shingles, and forest products for interstate shipment from the States of Oregon and Washington, and the number of cars

330 furnished on said applications."

Commissioner PROUTY: Mr. Teal, the number of cars applied for does not necessarily enter very much into this matter. We ought to know the number of cars handled, and the direction in which those cars have been handled.

Mr. TEAL: We also asked for a tabulated statement showing car movement of lumber and lumber products through Ashland, Oregon, by years from and including the year 1898 to and including the year 1906, and by months from January, 1905, to December 1, 1907.

Commissioner PROUTY: There is an embarrassment about providing that information on account of the fact that the records of the Southern Pacific Company have been destroyed. I do not know whether those particular records have been destroyed or not.

Mr. COTTON: We will do the best we can to furnish that to you. If we can find it, we will give it to you.

Mr. TEAL: I know that a part of the records have been destroyed; but I have a distinct recollection that these gentlemen have furnished information about the number of cars going to Ashland, in another case.

Mr. DILLARD: I think possibly we can get that from the Oregon office.

331 I had forgotten that there was a statement introduced in the other case.

Mr. TEAL: Yes sir; about seven thousand and odd carloads. Mr. Miller testified to it in that other case.

Mr. COTTON: I would like to have all of these articles read and I

think then the Commission will understand why I told Mr. Teal I did not intend to comply with them.

Commissioner PROUTY: You need not take up the time to read all of the paper.

Mr. TEAL: I next called for a tabulated statement showing the total tonnage of freight carried by the defendants' lines in Oregon, both inter and intrastate, for the years commencing with and including the years 1898 down to and including the year 1907, to December 1st.

That is for the purpose of showing the increase of business on this road in the freight movement. Of course, if the records are burned we cannot show it.

Mr. COTTON: I do not think that can be shown. I do not know whether the Southern Pacific makes a separate operating report on the Oregon & California line or not. I think it is possible that it is all bunched in together.

Mr. TEAL: The next is "Tabulated statements showing the number of cars delivered by you to the Salem, Falls City & Western Railway Company at Dallas, Oregon, and the number of loaded cars received by you from said road at said point, and the number thereof so received which were loaded with lumber since the Salem, Falls City & Western Railway has been in operation, said table to show delivery and receipt of cars by years.

Commissioner PROUTY: What railroad is that?

Mr. TEAL: That is one of the branch lines that was referred to. It has not been in operation very long. I would like to show the volume of traffic originating on that road.

Commissioner PROUTY: I expect you could show the number of cars received over that road during some certain period, and it would be proper for you to do so.

Mr. COTTON: Yes; we can.

Commissioner PROUTY: It is hardly worth while to cover the whole period asked for by Mr. Teal.

Mr. COTTON: There are two little roads which were built in to the timber country, just like this Wendley line.

Mr. TEAL: I would like to have the Commission see what traffic these little lines of which you speak furnish to the big roads.

Mr. COTTON: There is no objection to that.

Mr. TEAL: The next is "Tabulated statement showing cars delivered at Mohawk Junction for use on what is known as the Mohawk Branch between Mohawk Junction and Wendling by years since the month of September, 1899, to December 1, 1907, and also the cars received at Mohawk Junction from said branch, and the number thereof loaded with lumber."

That of course can be limited to 1905; but I would like to show what comes off from that branch in the shape of traffic to the main line.

Mr. COTTON: I guess we can furnish that in the course of time.

Mr. TEAL: I did ask for the number of local passengers; but I will omit that. I also asked to have made a table showing the

car movement of lumber and lumber products from Salem to California that is included in this \$3.10 territory and also points based on the \$3.10 rate, directly tributary thereto within a radius
334 of \$1.90 per ton carload lumber rate from San Francisco by years from and including the year 1898 to and including the year 1906, and by months from January 1, 1903, to December 1, 1907.

Mr. COTTON: That is from Salem and points adjacent to Salem?

Mr. TEAL: No; I mean from Salem to the South.

Mr. COTTON: That means that we have got to go from 1898 and examine every little way bill from the north of Salem.

Mr. TEAL: I will state to the Commission that the only way in which it will be possible to show the traffic that moved in this \$3.10 territory would be by an answer to this question. If they decline to show it, it is perfectly satisfactory to me.

Mr. COTTON: We can show everything that passes Ashland.

Commissioner PROUTY: Why does not that answer your question? Suppose they show everything that passes Ashland going south, and in addition to that show the loaded cars of lumber which they carry out of Portland. I presume some lumber has gone from Portland;
335 even since the higher rate. If they would show that for some special year when traffic conditions were in a normal state, as, for instance, in 1905, would not that answer your question?

Mr. TEAL: No and yes—not unless you separate your \$3.10 basis from the \$5.00 rate.

Commissioner PROUTY: The Commission will make some arrangement about that.

Mr. TEAL: In the table showing the movement through Ashland, I would like to have separated and segregated the cars that they load with lumber, as distinguished from the cars loaded with commercial freight.

Commissioner PROUTY: How do you keep your accounts; do you keep them so as to show that?

Mr. COTTON: I am sure I do not know. My connection with the Southern Pacific is very nominal, and I have nothing to do with their ordinary business or litigation.

Mr. DILLARD: I cannot answer as to those two lines.

Commissioner PROUTY: Is this all you have asked for?

Mr. TEAL: No; that is not all I have asked for, but that is all I am going to ask for now.

Commissioner PROUTY: If you will let us take that paper,
336 we will consider it and make some order in regard to it.

Mr. TEAL: I would like to have a statement filed in this case showing the division allowed on the earnings, the interstate earnings, to the Oregon & California Railroad Company on all business passing Ashland.

Commissioner PROUTY: I have understood that the Southern Pacific operated this line from Portland down to San Francisco, and must not the whole line be treated as a unit in determining this question?

Mr. COTTON: No.

Mr. DILLARD: I think they keep those divisions separately.

Commissioner PROUTY: I asked whether in this case we must not consider the line as a unit.

Mr. TEAL: Yes sir.

Commissioner PROUTY: What do you say to that, Mr. Cotton? Do you make any claim that the Oregon & California Railroad earns a certain amount of money and we only ought to consider what that road earns?

Mr. COTTON: I do not know about that; but it does seem to me that when the Southern Pacific operates only seven hundred miles north of California that we ought to make a rate for that seven
337 hundred miles, when it is a separate and distinct branch, and has nothing in common with other lines.

Commissioner PROUTY: I am not saying there is any connection between the earnings of the Southern Pacific as a whole and the earnings of that piece of road; but I say that this piece of road from Portland down to San Francisco should be treated as a unit.

Mr. COTTON: I infer that they do keep separate accounts for the Oregon & California, from the fact that we have a lease agreement, and I infer that the Interstate Commerce Commission have reports from the road——

Mr. TEAL: Those reports show it separately and do not show a division of the expenses. We do not care, at this time, to enter into a discussion as to how freight should be treated that originates on that line, and affects all the system, or *vice versa*; but I should like to have at this time information as to the division allowed the Oregon & California, and information as to how the expenses are divided.

Mr. COTTON: I do not know how the expenses are divided. I can tell you what the division is.

338 Mr. TEAL: When the time comes to present this case, I can show the Commission how necessary these things are.

Mr. COTTON: We do not carry those things in our heads. This is new matter altogether. I can tell you the divisions now; but I cannot tell you how the orders are derived.

Mr. TEAL: I will ask for a statement showing the divisions of all interstate trade that reaches the Oregon & California, and what proportion is allowed to them.

Mr. COTTON: Do you want it right now?

Mr. TEAL: No sir. I also want a statement showing the proportion of operating expenses charged, other than those that are the direct result of operations locally.

Mr. DILLARD: We will show you, as nearly as we can, the total expense of operating from Portland to California.

Commissioner PROUTY: Does the Oregon & California Railroad have a separate operating account?

Mr. DILLARD: Yes sir; they have, but I do not know how it is made up.

Mr. TEAL: I shall also file with the Commission a report of the

Board of Commissioners of the State of Oregon on assessment
339 and taxation, and I will give the pages to which I want to
refer. I will refer to the reports filed in connection with the
operation of the Oregon & California Railroad Company.

I would like to have it admitted, as I imagine it will be, that the
Corvallis & Eastern is now owned and controlled by the Southern
Pacific Company.

Mr. COTTON: I do not think we are prepared to admit that.

Mr. TEAL: It has been stated a half dozen times in this case.
There has not been a witness examined, when you have not made
that statement.

Mr. COTTON: It may not be by the Southern Pacific.

Mr. TEAL: Then I will ask that it be admitted that it is operated
by somebody in harmony with the Southern Pacific.

Mr. COTTON: I will state that it is operated by Mr. O'Brien, Vice
President of the Oregon & California line.

Mr. TEAL: I think that is our case. I will hand these documents
up to you.

Commissioner PROUTY: We will make some order about
340 that tomorrow morning.

The Commission thereupon adjourned until to-morrow, Saturday,
December 21, 1907, at 10 o'clock a. m.

341 WASHINGTON, D. C., *December 21, 1907.*

The Commission met at 10 o'clock a. m.

Present: Commissioners Prouty and Cockrell.

Present also, counsel for the respective parties.

Commissioner PROUTY: Mr. Cotton, in considering what infor-
mation you ought to furnish, it seems that one important item to the
Commission will be the number of car loads of lumber passing south
through Ashland and north through Ashland. During what period
of that time can you furnish that information?

Mr. COTTON: Mr. Miller, during what period of time do you think
you can furnish the number of car loads of lumber passing south
through Ashland?

Mr. MILLER: I have some figures here.

Commissioner PROUTY: How long a period would they cover?

Mr. MILLER: Since 1901.

Commissioner PROUTY: You can furnish, then, the num-
342 ber of car loads passing through Ashland for the years 1905,
1906, and 1907?

Mr. MILLER: Yes, sir.

Mr. COTTON: I think we might as well start back as far as we can.

Commissioner PROUTY: Yes; start back as far as you can.

Mr. COTTON: And north bound, where we connect with the O. R.
& N., of course we have full records. Our records are intact.

Commissioner PROUTY: Is Ashland an operating divisional point?

Mr. COTTON: Yes, sir.

Commissioner PROUTY: You could, of course, show the same in-

formation with respect to the lumber movement through Portland that you can through Ashland?

Mr. COTTON: Yes, sir; going out.

Commissioner PROUTY: Going out towards the east?

Mr. COTTON: Yes, sir.

Commissioner PROUTY: Can you show, Mr. Cotton, the movement of all your cars through Ashland—the total number of cars?

Mr. COTTON: Yes, sir.

343 Commissioner PROUTY: We will ask the defendants to file statements, then, showing, first, the number of car loads of lumber passing south through Ashland for the years 1905, 1906 and 1907. Of course you can go as much farther back as you choose.

Mr. TEAL: If you will pardon me, if it can be done I would like to have it from 1899. That was our request.

Mr. COTTON: We will go back as far as we can.

Mr. TEAL: I would like to have it start with the rate.

Commissioner PROUTY: Second, the total loaded and empty car movement through Ashland in both directions for the years 1905, 1906, and 1907. I do not think it is necessary to go back of that time, unless you want to. If possible, classify this last statement as you did, Mr. Cotton, in your O. R. & N. statement.

Mr. COTTON: Yes, sir.

Commissioner PROUTY: Can you show the average loading of lumber on your road, Mr. Miller?

Mr. MILLER: No, sir.

Commissioner PROUTY: Can you show it on the Oregon & California road?

344 Mr. MILLER: No, sir.

Commissioner PROUTY: You could show it for a certain limited time. You could figure it out from your way bills.

Mr. MILLER: It would have to be prepared; yes, sir. We have not the data in shape.

Commissioner PROUTY: We will ask you to show the average car load of lumber for what would be some representative month during this present year.

Mr. TEAL: And during the spring, or when they were moving.

Commissioner PROUTY: Say during the month of May, 1907.

Mr. TEAL: I do not believe they were moving then. I think it would be well to take the month of May 1906 and say February 1907.

Commissioner PROUTY: Whenever this lumber moves, it moves in car load lots, and the car load loadings would be about the same. We are not asking for the number of cars moved, but we are asking for the average car loading.

Mr. TEAL: Any month they say would be satisfactory to me.

345 Commissioner PROUTY: What do you say would be a representative month, Mr. Miller, for the year 1907?

Mr. COTTON: February would be a good month, would it not, Mr. Teal?

Mr. TEAL: Any month you say that would give an average loading.

Commissioner PROUTY: Show the average car load loading for the month of February 1907 on the Oregon & California road. Commissioner Cockrell would like to have you supply that same information for the same month in 1906, if you can.

Mr. COTTON: Yes, sir.

Commissioner PROUTY: Now, show these same facts with reference to the movement through Portland of lumber, and the loaded and empty car movement, that you show through Ashland.

Mr. COTTON: That is, from the Southern Pacific?

Commissioner PROUTY: From the Southern Pacific, through Portland. We would also like to have you show the size of your trains in and out of Ashland. Take the first week in February, 346 1907, the first week in June and perhaps the first week in November, and show the number of trains which you hauled out of Ashland towards the south, the number of cars in each train, the number of loaded cars and the number of empty cars. Show the number of trains into Ashland for the same period, the number of loaded and the number of empty cars, and give the same information with respect to your trains out of and into Ashland towards the north and from the north.

Mr. TEAL: Could that same statement cover any period you desire to name in 1905?

Commissioner PROUTY: It occurred to me, Mr. Teal, that it might be a difficult matter for them to go back. Do you know, Mr. Miller whether you could go back and furnish that information?

Mr. MILLER: It may be practicable, but I very much doubt it.

Mr. TEAL: They have records in the office at Ashland.

Commissioner PROUTY: You would have records for this year, undoubtedly?

Mr. COTTON: Yes, and we might have records at Ashland, if they were not destroyed, that would show it.

347 Commissioner PROUTY: If you can show the same information for 1905, you may show it. I do not attach very great importance to that. Now, can you compare the entire lumber tonnage upon the Oregon & California Railroad with all your other tonnage?

Mr. MILLER: Yes; I think so.

Commissioner PROUTY: You may do that for such a period as you can. Can you show the entire lumber earnings on that road as compared with your entire freight earnings for any period?

Mr. COTTON: We could with lumber and forest products, I think.

Commissioner PROUTY: Lumber and forest products on the Northern Pacific would not mean anything.

Mr. COTTON: I do not think we transport any logs to speak of at any place on that road.

Commissioner PROUTY: Then if you can show the earnings from the transportation of lumber and forest products——

Mr. COTTON: I really think the earnings from lumber and forest products would practically answer, and it would save a little trouble in getting it up.

348 Mr. MILLER: Yes; we could furnish that.

Commissioner PROUTY: Do you keep, Mr. Cotton, and Mr. Miller, the same statistics for the Oregon & California Railroad which we require for operating railroads?

Mr. COTTON: I think they do, sir. When I state that, I state the fact that it appears in the Southern Pacific annual report that they apparently treat the Oregon & California as a separate railroad, and it apparently keeps separate books of accounts; and the account which is published there of earnings and operating expenses follows the standard form which the Commission has adopted. I infer that they do.

Commissioner PROUTY: Do they, Mr. Teal? Does the Oregon & California make a report to this Commission?

Mr. TEAL: Not an operating report.

Mr. COTTON: Not an operating report, but the Southern Pacific apparently keeps the earnings.

Commissioner PROUTY: Then we would like to have you file, if you keep those facts, a statement showing your total earnings, your passenger earnings, your freight earnings, the percentage of
349 operating expenses, the earnings per train mile, from freight not passengers—and the operating cost per train mile.

Mr. COTTON: All right, sir.

Commissioner PROUTY: What fuel do you use on that road, Mr. Cotton?

Mr. COTTON: Oil, to a major portion of the road, I think, and wood to some extent.

Commissioner PROUTY: We would like to have you file a statement, reduced to a coal basis, showing the cost of fuel per ton on that line.

Mr. DILLARD: What period do you want that to cover?

Commissioner PROUTY: I think you may show that for the present year if you care to.

Mr. DILLARD: Enough, at any rate, to be illustrative to the Commission?

Commissioner PROUTY: Yes. The last time I was over that road, and it was not a very long time ago either, I think the passenger train was hauled by a couple of locomotives which burned wood.

Mr. COTTON: There is some wood. As I say, the major portion is coal oil, but there is wood, I think, in spots.

350 Commissioner PROUTY: As it appears to me, it would be a difficult matter for you to compare your present price of fuel with the price when this rate was put in, but you can show what is the cost on the basis of a ton of coal. Now, Mr. Teal, you asked for a statement of the quantities of lumber purchased by the Southern Pacific in the Willamette Valley. Do you care for that?

Mr. TEAL: They are going to furnish that in the other case.

Commissioner PROUTY: They are going to furnish it in the other case with respect to these other roads.

Mr. COTTON: And the Southern Pacific, too.

Commissioner PROUTY: If you are going to furnish that, please distinguish between the Portland mills and the mills in the Will-

amette Valley. What we would like to get is the amount of lumber purchased by the Southern Pacific road from these mills in the Willamette Valley, not including Portland.

Mr. COTTON: I want to make an explanation both to the Commission and to Mr. Teal in regard to this lumber statement. I find by inquiry that we have a system that is going to make it a little difficult to point out just exactly the information which I agreed to furnish Mr. Teal. Mr. Kohler, the purchasing agent of the O. R. & N., buys ties for everybody connected with the Harriman system. Those ties are taken in first into the O. R. & N. accounts. That is, they are carried practically in suspense. Then the ties are sold to the Short Line, the Union Pacific and the Southern Pacific Lines in Oregon, I think. I am not quite positive about that. That is simply done as a matter of convenience, because it keeps a big stock of ties on hand, and they file requisitions when they need ties. Other timbers are bought by the respective purchasing agents of the three companies, so it is going to be very difficult. I am going to show the total number of ties purchased by the O. R. & N. and show the prices, and from whom, in compliance with Mr. Teal's request, and then I will show the number of ties which were delivered by the O. R. & N. to these companies; but I can not answer Mr. Teal's question as to whose ties any one of the Companies has got. You see what I mean?

Commissioner PROUTY: Yes.

Mr. COTTON: But as to other timbers I can.

352 Mr. TEAL: In connection with that, Mr. Commissioner, there is one piece of information I would like to have. However, I will wait until you finish.

Commissioner PROUTY: Mr. Teal, you asked for the annual reports to the stockholders.

Mr. TEAL: That is already furnished in the other case.

Commissioner PROUTY: You also asked for the delivery of loaded and empty cars to connections at Dallas, Mohawk and Cottage Grove.

Mr. TEAL: By these branch lines that were spoken of.

Commissioner PROUTY: It would not seem that this information is of very great importance, and if it would be much work to furnish it, Mr. Cotton, we do not know that we would require it, but if it is not, you might furnish it. For how many years do you want it, Mr. Teal?

Mr. TEAL: Three years would be enough, 1905, 1906 and 1907. Some of them have been operating that long.

Mr. COTTON: I think we can furnish it.

353 Commissioner PROUTY: Then you may furnish the information showing the deliveries of loaded and empty cars to the Southern Pacific by these connections at Dallas, Mohawk and Cottage Grove.

Mr. COTTON: I know we can at Dallas and Cottage Grove, because they naturally have a car interchange. Whether we can at Mohawk, I do not know; but the Booth-Kelly people can tell about it themselves, almost.

Commissioner PROUTY: Was there anything, Mr. Teal, to which you attach special importance in your request?

Mr. TEAL: There was this, Mr. Commission-: I would like to have the number of cars shipped from any of the company mills sawing material. I would like to keep their freight separate from the commercial movement here.

Commissioner PROUTY: How much of that company business is there on that line?

Mr. TEAL: I think there are three mills running.

Mr. DILLARD: Mr. Teal, why will that be necessary? We show the commercial freight generally separate from—

Mr. COTTON: We want to show the commercial lumber.

354 Mr. TEAL: That is what I wanted. It is rather important in regard to the question of a basis for a rate. It is a question how much it is costing them for their own lumber, and it should be very easily furnished.

Commissioner PROUTY: You do not know, Mr. Cotton, whether you keep company freight separate from other freight or not? That is to say, when you ascertain the gross lumber tonnage on your railroad, that would embrace company freight, would it not?

Mr. COTTON: How is that, Mr. Miller?

Mr. MILLER: No, sir.

Mr. TEAL: Their accounts are kept separately. They keep separately the company freight and the freight that pays. That is, all their accounts do, and at any rate they have the record of car shipments from these mills that they own.

Mr. DILLARD: The suggestion I was making was that it would be needless, because if we show the commercial freight separate from the company freight, the freight we ship from our own mills as company freight would be embraced in that, and that would be simply a part included in the other.

355 Commissioner PROUTY: If you can show your company tonnage separate from the other tonnage, of course that answers the question.

Mr. TEAL: It does not necessarily answer the question as to lumber.

Mr. DILLARD: I was speaking about lumber.

Mr. TEAL: I think that is very important in this case; more so than in most cases.

Mr. COTTON: I think we can show the shipments from these mills. They have only been running—how long, Mr. Dixon?

Mr. DIXON: Some of them over a year, I think.

Mr. COTTON: It is just about a year. We can show the shipments from these company mills.

Commissioner PROUTY: Do you keep your accounts in such a way that you can show your company lumber tonnage which is not handled under the tariff?

Mr. MILLER: I think so.

Commissioner PROUTY: If you can show that, that would be more satisfactory.

Mr. COTTON: That would not show the saw mills, because
356 we buy a stack of stuff from these gentlemen. If he wants the saw mills, we can furnish them.

Mr. TEAL: What I want is to know how much came from the saw mills and how much company stuff was purchased and moved by themselves. That ought to be easily furnished.

Mr. COTTON: I think we can separate them.

Mr. TEAL: Mr. Miller, do you charge company freight on that fine?

Mr. MILLER: No, sir.

Mr. TEAL: Then I want it to appear on the record that they do not charge for that.

Commissioner PROUTY: You want a statement of the divisions between the Oregon, California and other lines?

Mr. TEAL: Yes, sir.

Commissioner PROUTY: That is all that occurred to us.

Mr. TEAL: There is one other matter. I do not know whether Mr. Cotton is sufficiently familiar with it or not. If they do make this report the same as other companies do belonging to this system,

then we will have an absolutely complete statement of the
357 Oregon and California business segregated. I have asked for the annual report of the Vice President, General Manager or other officer in charge of the defendant, the Oregon & California Railroad Company, to any other official of that company, or of the Southern Pacific Company, to whom he makes annual reports of the business and operations of said company. To explain what I mean—

Mr. COTTON: We do not keep the Oregon & California separately.

Mr. TEAL: Then it can not be done. The O. R. & N. shows absolutely separately everything connected with their business.

Mr. COTTON: The Oregon & California is operated as a part of the Southern Pacific.

Mr. TEAL: I think that will cover it.

Mr. COTTON: We will give you all the statistics, Mr. Commissioner, north of San Francisco that you have covered, or all that we think will be illustrative of the situation.

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December 21, 10:30 a. m.

Mr. COTTON: Mr. Dixon, or Mr. Booth, with reference to these shipments that Mr. Booth talked about being made south, does that include both company and commercial stuff?

Mr. DIXON: That is commercial material only.

Mr. COTTON: Can you furnish it by year, the number of cars that went out of your mill for the company?

Mr. DIXON: You have it approximately in feet in that exhibit I filed, showing the distribution of our lumber. The right hand column there was practically all Southern Pacific lumber that went south.

Mr. COTTON: Did you show the company material south?

Mr. DIXON: It shows railroad material. That is what it all was in the last year—Southern Pacific.

Mr. COTTON: I will recall you to the stand for a moment.

359 A. C. DIXON resumed the stand for further cross-examination:

Mr. COTTON: In connection with your testimony in the Eastern Lumber case, there was filed an exhibit of your shipments to various points and places, and under the Column I are shown shipments of railroad material. To what points did that railroad material go—railroad material other than east of the Missouri River?

Mr. DIXON: My impression now is that this was all shipped to points in California, with the exception of a portion of that shipment in the last two years; that it all went to the Southern Pacific Company, either at Oakland Long Wharf, or some point in Southern California.

Mr. COTTON: Then those shipments year by year, with the exception of shipments the last two years, were all made to the Southern Pacific Company?

Mr. DIXON: That is my impression. As I told you, in furnishing this, it was gotten up rather hurriedly, and if it is not correct I will correct it when I get home.

360 Mr. COTTON: It is approximately correct?

Mr. DIXON: I think so.

Mr. COTTON: Your sales to mills were comparatively small?

Mr. DIXON: Yes sir.

Commissioner PROUTY: That is, to any other railroad?

Mr. COTTON: Yes; I mean any other railroad. And during the last two years, of your stuff that went south, railroad material, was much of that to any other company?

Mr. DIXON: Well, I should say that 85 per cent. of it was to the Southern Pacific.

Mr. COTTON: And that was bought f. o. b. the mill?

Mr. DIXON: Yes sir.

Mr. COTTON: Can you give me a statement of the prices that were paid for that in various years, from the time you began doing business until the present time? That is, I do not mean each item, but of the grades. Take ties, and then better class lumber, an average statement for each year. Do you think you can furnish it?

361 Mr. DIXON: I think we filed that yesterday. Mr. Booth, at least, testified from a statement showing average prices, and I think it was filed here.

Mr. BOOTH: The one you filed from me covers that. The statement you took from me, filed as an exhibit, covering the various kinds of material, including ties.

Mr. COTTON: Then that is all right. Then the prices which appeared on that stuff, that I thought possibly was commercial stuff, are just about the same as the railroad prices?

Mr. BOOTH: It is designated as railroad, and also as commercial stuff.

Mr. COTTON: That is all, Mr. Dixon. I would like to have Mr. Dixon's exhibit that he referred to considered in evidence in this case. I will call Mr. Miller.

352 *Testimony on Behalf of the Defendants.*

R. B. MILLER, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Mr. COTTON: Mr. Miller, how long have you been engaged in the railroad business at Portland?

Mr. MILLER: Twenty years.

Mr. COTTON: During that time you have been connected with what company?

Mr. MILLER: The Southern Pacific and O. R. & N. Company.

Mr. COTTON: When was your first employment with the Southern Pacific?

Mr. MILLER: In 1900.

Mr. COTTON: How long were you employed in 1900 by the Southern Pacific?

Mr. MILLER: In 1900.

Mr. COTTON: How long were you employed in 1900 by the Southern Pacific?

Mr. MILLER: 1900 and 1901, about 9 months as General
353 Freight Agent of the lines in Oregon.

Mr. COTTON: You were purely a Southern Pacific officer at that time?

Mr. MILLER: Yes.

Mr. COTTON: Prior to that you had been employed by the Oregon Railroad and Navigation Company?

Mr. MILLER: Yes sir.

Mr. COTTON: In the freight office?

Mr. MILLER: Yes sir.

Mr. COTTON: When you left the Southern Pacific employ what did you do then?

Mr. MILLER: I became the General Freight Agent of the O. R. & N. Company.

Mr. COTTON: Did you afterwards resume your connection with the Southern Pacific Company?

Mr. MILLER: Yes sir.

Mr. COTTON: When?

Mr. MILLER: About 1904.

Mr. COTTON: And since 1904 you have had charge of the traffic of both lines?

Mr. MILLER: Yes sir.

Mr. COTTON: What is your title on the Southern Pacific line?

354 Mr. MILLER: General Freight Agent of the lines in Oregon.

Mr. COTTON: And on the O. R. & N.

Mr. MILLER: General Freight Agent.

Mr. COTTON: Have you been more or less familiar with the busi-

ness of the Southern Pacific Company since your first connection with it in 1899?

Mr. MILLER: Yes sir.

Mr. COTTON: Have the relations between the companies been such as to cause you to keep in touch with it to a greater or less extent?

Mr. MILLER: Yes sir.

Mr. COTTON: Mr. Miller, at one time I understand from this history that the rate of \$3.10 applied from Portland, east Portland, to Saginaw, Coburg and Albany only, and was afterwards extended to other points. Was that \$3.10 rate taken out to any points?

Mr. MILLER: Yes sir.

Mr. COTTON: To what points, first was it taken out?

Mr. MILLER: Well, it was advanced to \$5 per ton from Portland on August 20, 1903, and advanced to \$5 per ton from the 365 Willamette Valley, that is, points south of Portland, on January 1st, 1904.

Mr. COTTON: Have you a history of these rates? That seems to differ a little from Mr. Lewis'.

Commissioner PROUTY: It was stated yesterday by Mr. Cotton that the advance to Willamette Valley points was on January 1st, 1904, and restored in May, 1904.

Mr. DILLARD: August 20th, 1903, from Portland alone.

Mr. COTTON: Mr. Lewis' statement would show that on August 20, 1903 the rate from Portland to Glendale, East Portland, Portland and Jefferson was cancelled and raised to \$5.

Mr. TEAL: That is right, and then a new tariff put in the same day, limiting it to just these points.

Mr. COTTON: I see now. Then you put in a \$5 rate from Portland?

Mr. MILLER: On August 20th, 1903.

Mr. COTTON: How long did that \$5 rate remain in force and effect from Portland?

Mr. MILLER: It was advanced on November 10th, 1903 to 366 \$7.50 a ton.

Mr. COTTON: Then what became of it afterwards?

Mr. MILLER: On December 7th, 1903 it was reduced to \$5 per ton, and has remained so ever since.

Mr. COTTON: Then since August 20, 1903 you have had no rate less than \$5 from Portland on green rough lumber?

Mr. MILLER: To San Francisco Bay points.

Mr. COTTON: Did you have a lower rate from Portland on rough green lumber than \$5 to other points in California?

Mr. MILLER: Yes sir.

Mr. COTTON: To what points?

367 Mr. MILLER: To points adjacent to San Francisco Bay.

The rates in effect to those points range from three dollars and fifty-five cents per ton to four dollars and ninety cents per ton.

Mr. COTTON: With five dollars as a maximum?

Mr. MILLER: With five dollars per ton as a maximum. The reason for that was that while the company did not meet the water competition in San Francisco because of the very low rate, it did

partially meet that competition at points adjacent to San Francisco Bay, where a higher rate was obtainable.

Commissioner PROUTY: Just a minute, Mr. Cotton. You say your rate since August 20th from Portland has never been less than five dollars to San Francisco proper?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: But that it has been less than five dollars to some points in the vicinity of San Francisco?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: That was for the reason that you did not see fit to make a rate low enough to meet water competition at San

Francisco, but did desire to meet water competition at points—
368 where the water must pay a rail rate out from San Francisco?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: Well, why should you not apply as low a rate to San Francisco as you apply anywhere, so that if a shipper from Portland can take advantage of it and desires to take advantage of it, he may.

Mr. MILLER: Well, we didn't regard the business as even desirable.

Commissioner PROUTY: Would it not be just as desirable to San Francisco as it would to some outlying point at the same rate?

Mr. MILLER: That might be, but we did not want to carry any San Francisco business on as low a basis, because in the first place the business was not desirable, and in the second place it required handling of the business in San Francisco proper—Bay transfer, switching, adding to the congestion or the conditions in the terminals; and altogether was not desirable even at the same rate, as was charged to an intermediate point.

Commissioner PROUTY: Are these points all intermediate points to which you made a lower rate than five dollars?

Mr. MILLER: Some of them are intermediate, and others
369 are on branch lines.

Commissioner PROUTY: They would all be reached without going to San Francisco?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: And you did not care to go to San Francisco because it cost you more to handle traffic at San Francisco?

Mr. MILLER: Yes, sir.

Mr. COTTON: What do you mean by these San Francisco Bay points? That is a phrase we have used with an apparent knowledge on the part of people using it; but tell us what it means.

Mr. MILLER: San Francisco Bay points, so-called, are the points on San Francisco Bay that can be reached by vessels, can be served direct by vessels.

Commissioner PROUTY: Are they reached in all cases by your rails?

Mr. MILLER: Yes, sir.

Mr. COTTON: In order to get to these San Francisco Bay points, what do you have to do? How do you get the freight there by rail?

370 Mr. MILLER: Well, to San Francisco it requires a transfer across San Francisco Bay.

Mr. COTTON: In what way?

Mr. MILLER: Car ferry.

Mr. COTTON: And how do you reach these other points?

Mr. MILLER: Oakland and Vallejo are reached by rail, but subject to car ferry across the Straits, and from Benicia to Port Costa, car ferry is required; in some instances one transfer, and in other cases two transfers by car ferry.

Mr. COTTON: Can you mention some of these other points, that is, what you call the points outside of San Francisco to which this \$3.55-\$4.90 rate applied? Just mention those.

Mr. MILLER: Well, there is Sacramento, Galt—

Commissioner PROUTY: Are those rates still in effect?

Mr. MILLER: No, sir.

Commissioner PROUTY: When were they withdrawn; last April?

Mr. MILLER: April 18th, last.

Commissioner PROUTY: So that now your five dollar rate applies to all this territory?

371 Mr. MILLER: Yes, sir.

Commissioner PROUTY: Why did you withdraw those rates at that time? Did you conclude not to meet water competition at those points even?

Mr. MILLER: Yes, sir; that is to say, we met the competition only in part.

Commissioner PROUTY: It would meet it only to the extent that the five dollar rate applied to all kinds of lumber?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: That rate would meet it as to higher grades of lumber?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: But it would not meet it as to the lower grades of lumber in all places?

Mr. MILLER: Yes, sir; that is correct.

Mr. COTTON: That is, it would not meet it merely on a rate basis?

Mr. MILLER: No; it would not meet it on a rate basis, and it would not hold all of the business to the rail lines. It would hold part of it, as a part of competition, but not all of it.

372 Commissioner PROUTY: Would you expect, Mr. Miller, from Portland, from Mr. Poulsen's mill, for example, where he might choose the way he would ship, by your line or by water, to get any of the San Francisco business on the present rates?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: What part of it; what kind of lumber?

Mr. MILLER: Well, we would get a considerable part of the higher grades of lumber, and we would get some of the common grades of lumber.

Commissioner PROUTY: Under what circumstances would you expect to get any of the common grades of lumber?

Mr. MILLER: Well, in the case of special orders, and in cases

where the quantity desired by the consignee was not sufficient to load a vessel.

Commissioner PROUTY: Mr. Poulsen has his election to ship either by water or by rail?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: And if he ships by water, he will still get the same price for his lumber, probably, as though he ships by rail?

Mr. MILLER: Yes, sir.

373 Commissioner PROUTY: But a manufacturer in the Willamette Valley who competes with Mr. Poulsen and who must ship by rail, would be obliged to take less for his lumber, would he not? That would be the effect of your tariff?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: He would either be obliged to go out of business or take less for his lumber?

Mr. MILLER: To the extent of the difference of the rate by rail from the Willamette Valley and the rate by water from Portland.

Mr. COTTON: Mr. Miller, you were mentioning these other points to which this \$3.55—\$4.90 rate applies. You mentioned Galt. What are some of the others?

Mr. MILLER: Milton, Waterford, Madesta, Elmira, Santa Rosa, Alma, and intermediate points with San Francisco. These are the extreme points that I have mentioned.

Commissioner PROUTY: Just how did you get at your rates to those points, Mr. Miller? It seems that when you made a \$3.10 rate to San Francisco, you also made a higher rate to these points?

Mr. MILLER: Yes, sir.

374 Commissioner PROUTY: And you reached that rate by adding to the \$3.10 rate the local rail rate out from San Francisco?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: Did you still continue to make your rate on that same basis to these outlying points?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: You simply withdrew the rate to San Francisco, but you left the rate at the outlying points?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: Fixed upon the same basis?

Mr. MILLER: Yes, sir; these points I have mentioned are the extreme points. Of course points nearer to San Francisco Bay would take a lower rate, relatively or proportionately, according to the local rate out of San Francisco?

Mr. COTTON: I think possibly you misunderstood the Commissioner, or I misunderstood you. What do you charge to Milton, Waterford, Madesta and these points now? What is your rate now?

Mr. MILLER: Five dollars per ton.

375 Mr. COTTON: You do not add the local on to the five dollars?

Commissioner PROUTY: No; those rates have all been withdrawn now. I was trying to get at the basis of the rates which he main-

tained to these points from Portland, as I understand, previous to 1907.

Mr. COTTON: He added the local then, but he does not add the local to the five dollars now.

Commissioner PROUTY: Not now. It is all five dollars now.

Mr. MILLER: The local was added to a basing rate, the \$3.10 rate, which was not in effect. It was merely the basing rate.

Mr. COTTON: But now it is all five dollars?

Mr. MILLER: All five dollars now.

Mr. COTTON: Where are these points situated, Mr. Miller, in a general way?

Mr. MILLER: Well, they are points shown in this red here (indicating).

Mr. COTTON: Down as far as that (indicating)?

Mr. MILLER: Yes; those are the outlying points where we added the locals out from San Francisco, subject to a maximum of five dollars per ton.

376 Mr. COTTON: So down here in these points—is that Sacramento over here (indicating)?

Mr. MILLER: Here is Sacramento.

Mr. COTTON: Then in order to get your freight down here south of San Francisco, were the distances greater or less, or about the same, as to San Francisco proper, even into this territory that appears to be south?

Mr. MILLER: Well, I should say substantially the same. There was not much difference in the distance.

Commissioner PROUTY: You do not go through Sacramento in going from Portland to San Francisco, do you?

Mr. MILLER: The business can move around that way and in here (indicating), but it comes down this other way.

Mr. COTTON: There is Sacramento up there (indicating). Does all your business going to San Francisco from the north pass through Sacramento or not?

Mr. MILLER: Well, they have different routes in there for handling the business. I think probably it all does not go through Sacramento.

Mr. COTTON: But the shortest line to San Francisco from the north is through what point? I got my pencil on the wrong place.

377 Mr. MILLER: The shortest route, I think—the passenger traffic is all handled through Sacramento.

Mr. COTTON: There is Sacramento right there (indicating).

Mr. MILLER: Some of these trains go through Sacramento and others do not.

Mr. COTTON: These other places down in through here—where are these two car ferries you speak about? Where is the one?

Mr. MILLER: The one is from Benicia to Port Costa and the other is from Oakland to San Francisco.

Mr. COTTON: Then these two car ferries you speak about are south of Sacramento and in the direction of San Francisco but are not on the line around into this territory (indicating)?

Mr. MILLER: Yes, sir; that is true.

Commissioner PROUTY: What is your rate to Sacramento now?

Mr. MILLER: Five dollars per ton.

Commissioner PROUTY: Has the rate ever been lower than that to Sacramento?

Mr. MILLER: I think it has, if the local rate from San Francisco to Sacramento was less than \$1.90 per ton.

Mr. COTTON: Then in getting the freight down here into this territory (indicating), you dodge San Francisco and get away from the two car ferries?

Mr. MILLER: Yes, sir.

Mr. COTTON: The distance looks apparently longer, but as a matter of fact, the service is different, your Honor. Then for a period of from 1903 down, you have not undertaken to meet water competition from Portland except as your five dollar might from time to time meet it?

Mr. MILLER: Yes, sir; that is true. We do not altogether meet it. We meet it only in part.

Mr. COTTON: During 1905 and the early part of 1907, was your rail rate lower than the charter rate from Portland?

Mr. MILLER: It was.

Mr. COTTON: That is, from what date in 1903?

Mr. MILLER: Well, the charter rates became very high in the latter part of 1906, and continued so through part of 1907. They ran up to nine dollars and nine dollars and a half a thousand feet.

379 Mr. COTTON: That was due to the fire?

Mr. MILLER: That was due to the San Francisco fire and the lack of water tonnage—vessels.

Mr. COTTON: There was a considerable quantity moved by water, was there not?

Mr. MILLER: A very large quantity.

Mr. COTTON: Did the Southern Pacific ship much by water from Portland?

Mr. MILLER: The Southern Pacific shipped considerable tonnage by water, its own material.

Mr. COTTON: I would like in that connection, without stopping to read it now, to have the privilege of referring to Mr. Buehner's statement in the gate-way case. Mr. Teal remembers the testimony.

Mr. TEAL: That is perfectly satisfactory, because it is so. There is no question about it.

Mr. COTTON: And on that the Southern Pacific paid the schooner rate, whatever it was?

Mr. MILLER: Yes, sir.

Mr. COTTON: Did the \$3.10 and the \$5 rate continue in force and effect to the extent that you were able to move stuff from the Willamette Valley during all this period?

380 Mr. MILLER: We were unable to move all the business.

Mr. COTTON: But the rate remained in effect?

Mr. MILLER: The rate remained in effect from the Willamette Valley.

Commissioner PROUTY: Mr. Miller, does any considerable quan-

tity of this lumber shipped from the Willamette Valley south over your line go, to any considerable extent, to San Francisco itself?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: Do you know what part of it?

Mr. COTTON: Yes, sir, we have a statement about that. Now Mr. Miller, what is your basis of rates on other commodities to and from San Francisco and these adjacent points, from and to Portland and the Willamette Valley points? That is, state what your general basis of rates is both ways.

Mr. MILLER: For instance, from San Francisco, to points in the Willamette Valley, we make the rates by rail on the basis of the water rate, ocean rate, from San Francisco to Portland, plus the return local either by rail or by river steamers, as the case may
381 be, according to the destination.

Mr. COTTON: Now take from Albany—well, let us take from Eugene. What is your rate on merchandise from San Francisco to Eugene?

Mr. MILLER: It is the water scale of rates from San Francisco to Portland plus the rail rates from Portland to Eugene.

Commissioner PROUTY: So your rail rate from San Francisco to Portland would be lower than your intermediate rates, would it?

Mr. MILLER: Yes, sir.

Mr. COTTON: What is your merchandise rate generally; that is, on your class rates from Eugene to San Francisco?

Mr. MILLER: The same arrangement.

Commissioner PROUTY: Is most of your traffic on that line moved under class rates except this lumber?

Mr. MILLER: Very little moves under the class rates.

Commissioner PROUTY: It is mostly on the commodity rates?

Mr. MILLER: Yes, sir; very little under the class rates.

382 Mr. COTTON: Do you make commodity rates to Eugene on merchandise, sugar and that kind of stuff, based on water competition plus the local back?

Mr. MILLER: Yes, sir.

Mr. COTTON: The mere fact that it moves on commodity rates does not change the rate adjustment?

Mr. MILLER: No; we make the commodity rates because of the commodity rate made by the water from San Francisco to Portland.

Commissioner PROUTY: I wish you would file a statement showing your class rates from San Francisco to Portland and Eugene, and also your commodity rates from San Francisco to Portland and Eugene on half a dozen standard articles, like sugar.

Mr. COTTON: Now, from points interior in California to Portland, what rates do you make?

Mr. MILLER: Well, generally on the basis of the combination on San Francisco and Sacramento, or the point to which it is subject to competition of the water lines.

Mr. COTTON: Then from Eugene to a point down here (indicating), what would be your rate going north from Eugene or going south from Eugene to the same point?

Mr. MILLER: We would use whatever the rate might be
383 to or from San Francisco or Sacramento, added to the local
there south.

Mr. COTTON: And then up north?

Mr. MILLER: The rate to Portland plus the local south.

Mr. COTTON: Then you built up into all these Willamette Valley
points on the water competition and also built up to or from all these
points south of San Francisco on the basis of water competition?

Mr. MILLER: Yes, sir.

Mr. COTTON: Does that apply generally to practically all classes
of commodities other than lumber?

Mr. MILLER: Generally, yes; that is the case.

Mr. COTTON: I have used Eugene in my illustrations. Is your
statement specific as to Eugene, or illustrative as to the Willamette
Valley territory generally?

Mr. MILLER: It is illustrative as to the Willamette Valley gener-
ally. At Eugene, however, we will use the rail rate from Portland
to Eugene or Eugene to Portland, in fixing the through rate to or
from San Francisco Bay points: to points north of Eugene, like
Albany or Salem. We would use the water basis of rates to
384 or from Portland, plus the water rates between Portland and
Salem or Albany.

Mr. COTTON: Your rail rates are the same as the water, are they
not?

Mr. MILLER: No; they are a little higher.

Mr. COTTON: Are there boats operating on the river?

Mr. MILLER: Yes, sir.

Mr. COTTON: The difference between the rail rates and the river
rates, though, is not material?

Mr. MILLER: Just nominal.

Mr. COTTON: Do you know anything about the sugar rates from
California to Eugene, for example?

Mr. MILLER: Yes, sir.

Mr. COTTON: Or Glendale? Glendale is down in the southern part
of the state is it not?

Mr. MILLER: Yes, sir.

Mr. COTTON: Tell us what is the rate on sugar from San Fran-
cisco to Portland, or on any other commodity, you may have in
your mind, something like that.

Mr. MILLER: The rate on sugar from San Francisco to Portland
by water at the present time I think is fifteen cents per one hun-
dred pounds.

385 Mr. COTTON: What do you charge to Glendale?

Mr. MILLER: Well, I don't know what the rate is from
Portland to Glendale, but it must be around 65, 70 or 75 cents a
hundred. 75 probably is nearer right.

Mr. COTTON: From Portland down to Glendale?

Mr. MILLER: Yes, sir.

Mr. COTTON: So you have about 15 cents from San Francisco to
Portland and 90 cents from San Francisco to Glendale?

Mr. MILLER: Yes, sir; 15 cents is the water rate. The rate by rail from San Francisco to Portland is about 18 cents a hundred pounds.

Commissioner PROUTY: You make that a commodity rate?

Mr. MILLER: We make that a commodity rate; yes, sir.

Commissioner PROUTY: Would you carry sugar from San Francisco to Glendale on a commodity rate or a class rate?

Mr. MILLER: We would carry it on a commodity rate, based on the commodity rate to Portland plus the return movement.

Mr. COTTON: Making your rate from San Francisco to Glendale about 90 cents a hundred?

386 Mr. MILLER: From San Francisco; yes, sir.

Mr. COTTON: On sugar?

Mr. MILLER: Yes, sir.

Mr. COTTON: How far is Glendale south of Portland?

Mr. MILLER: About 250 or 275 miles.

Mr. COTTON: Can you give the Commission a notion about any other commodity? Sugar is a commodity that moves from San Francisco in quite large quantities, does it not?

Mr. MILLER: Yes, sir.

Mr. COTTON: That is, in considerable quantities?

Mr. MILLER: It moves in large quantities.

Mr. COTTON: Can you take any other standard commodity that moves from California into these Willamette Valley points and give us the rates on it?

Mr. MILLER: Well, canned goods is a commodity that moves in some volume. The conditions with respect to canned goods are similar to sugar.

Mr. COTTON: Give us the rate on canned goods from San Francisco to Eugene or Glendale for example, both of them.

387 Mr. MILLER: The rate on canned goods from San Francisco to Eugene or Glendale would be the water rate from San Francisco to Portland, which is fifteen cents per hundred pounds, I think, or about that, plus the return local.

Mr. COTTON: What is the return local to Eugene?

Mr. MILLER: To Eugene it is about 25 or 30 cents per hundred pounds.

Mr. COTTON: And what is it down to Glendale?

Mr. MILLER: About 75, the same as on sugar.

Mr. COTTON: I wish you would file with the Commission your local tariffs from Portland into this territory south, and in order to show what you add, this ocean competition rate in order to reach these points and places, and also file your lumber tariff from these points and places into Portland.

Commissioner PROUTY: Do not file all your local tariffs, Mr. Miller. File your class tariff and then pick out a half dozen commodities and give us grades on those.

388 Mr. COTTON: I am just trying to show where we get our rates largely from on this road. Are these rates which you have given here higher or lower than the rates which prevail in the northwest generally on merchandise—these lumber rates you have been speaking about?

Mr. MILLER: The rates out of Portland on the Southern Pacific are generally lower than obtain elsewhere in the northwest country.

Mr. COTTON: I wish you would file a comparison. I think there was a comparison filed, was there not, in the Spokane rate case? Did you show the Southern Pacific rates in that?

Mr. MILLER: We made a comparison, but I don't think it was filed with the Commission, although I don't know.

Mr. COTTON: I do not think the Southern Pacific rates were compared.

Commissioner PROUTY: No; the O. R. & N. rates.

Mr. COTTON: I would like you to add to that comparison which you made in the Spokane rate case, the Southern Pacific rates for similar distances, just supplementing that comparison, and then file the whole complete comparison with the Commission.

Mr. TEAL: Mr. Miller, in order to save time, in these things that you file, will you furnish me with a copy at Portland?

Mr. MILLER: Yes, sir.

389 Mr. COTTON: Mr. Miller, do you know what the total shipments of lumber via the Southern Pacific to all these points and places were in 1898?

Mr. MILLER: Yes, sir.

Mr. COTTON: How many cars?

Mr. MILLER: 2168 cars via Ashland. There was no movement via Portland at that time.

Mr. COTTON: In 1906 how many cars of commercial lumber moved from Oregon via the Southern Pacific lines?

Mr. MILLER: Nine thousand—

Mr. COTTON: In 1906, commercial lumber.

Mr. MILLER: There were 13,140 cars.

Mr. COTTON: Now, have you a statement showing the distribution of those cars and where they went to?

Mr. MILLER: Yes, sir.

Mr. COTTON: To San Francisco Bay points from Portland, how many cars?

Mr. MILLER: 699.

Mr. COTTON: To Bay District points from Portland?

Mr. MILLER: 1015.

Mr. COTTON: To other California points from Portland?

Mr. MILLER: 1463.

Mr. COTTON: To Utah, Nevada and Arizona via Ashland?

390 Mr. MILLER: 161.

Mr. COTTON: Now, from points south of Portland, that is, all Willamette Valley points, how many cars to San Francisco Bay points?

Mr. MILLER: 1494.

Mr. COTTON: To Bay district points?

Mr. MILLER: 391.

Mr. COTTON: To other California points?

Mr. MILLER: 1363.

Mr. COTTON: To Utah, Nevada and Arizona via Ashland?

Mr. MILLER: 159.

Mr. COTTON: Then to San Francisco Bay points there were shipped 1494 as against something over seventeen hundred cars to Bay district points and other California points from Willamette Valley points. Is that right?

Mr. MILLER: Well, there was 1494 to San Francisco Bay points and 391 cars to points adjacent to San Francisco Bay.

Mr. COTTON: And how many to other points in California?

Mr. MILLER: 1363.

Mr. COTTON: In the meantime, when you were transporting about 3100 cars to points south via Ashland, how many cars moved north from Willamette Valley points to the east via Portland, during the same period?

Mr. MILLER: 1906?

Mr. COTTON: Yes.

Mr. MILLER: The movement from points south of Portland to the east via Portland and the O. R. & N. was 6,395 cars.

Mr. COTTON: I think that is all practically read in, but would like to have that statement copied. It is in tabulated form, and might be a little more convenient in picking it out from the testimony.

(The statement referred to is as follows:)

	From Portland.	From points south of Portland.	Total.
To San Francisco Bay Points...	699 cars	1494 cars	2193 cars
Bay District Points.....	1015 "	391 "	1406 "
Other California Points.....	1463 "	1363 "	2826 "
Utah, Nev. Ariz. via Ashland..	161 "	159 "	320 "
Points beyond Portland.....	.....	6395 "	6396 "
Total.....	3338 "	9802 "	13140 "

392 Mr. COTTON: I see you have given me a statement to the effect that during 1906, 1885 cars of the shipments made by the complainants were destined to the territory affected by the advance of April 8, 1907. What do you mean by that. Is that so?

Mr. MILLER: I mean to say that of the movement from points south of Portland to San Francisco Bay points and the points adjacent to San Francisco Bay, there moved 1885, or 19 per cent., of the total movement of lumber south and east via Portland from points south of Portland.

Mr. COTTON: Then of the total shipments made from the Willamette Valley during 1906, amounting to 9802 cars of commercial lumber, there were only 1885, cars that moved to points or places affected by this advance in rate complained of?

Mr. MILLER: Yes, sir; and more or less of that business of the 1885 cars paid the rate of five dollars per ton, but I have no way of segregating that as between the five dollar rate and the business that paid a lower rate.

Mr. COTTON: Do you know what the rate situation was prior to April 22, 1899? Have you looked into that?

Mr. MILLER: Yes, sir.

393 Mr. COTTON: What were the rates?

Mr. MILLER: The rate of \$3.10 per ton was established on April 22, 1899 to San Francisco—

Mr. COTTON: I said what was it prior to that.

Mr. MILLER: On April 25 1898, the rate from Portland to San Francisco, Oakland and Vallejo Junction was four dollars per ton.

Mr. COTTON: What was it from Portland to any other point or place?

Mr. MILLER: The rate to Sacramento and to certain intermediate points was five dollars per ton.

Mr. COTTON: What was the rate prior to April 22, 1899 from Albany, Coburg and Saginaw?

Mr. MILLER: There does not appear to have been any rate in effect prior to June 6th, 1898 from points south of Portland.

Mr. COTTON: What was that rate?

Mr. MILLER: But on June 6th 1898, apparently, the rate from Albany, Coburg and Saginaw was made the same as from Portland, or four dollars per ton, to San Francisco, and five dollars per ton to Sacramento and certain other intermediate points.

Mr. COTTON: That was put in then at four dollars?

394 Mr. MILLER: Yes, sir.

Mr. DILLARD: In June 1898.

Mr. COTTON: Yes, in June. Then prior to April 22, 1899 you had a four dollar rate only to San Francisco, Oakland and Vallejo—all points on San Francisco Bay?

Mr. MILLER: Yes, sir.

Mr. COTTON: Then in addition to that, to any other point or place, of course, you added the local out?

Mr. MILLER: Yes, sir.

Mr. COTTON: So prior to the time when this four dollar rate was put in, followed shortly afterwards by the three dollars and ten cent rate, you had the same adjustment of rates in California on lumber, substantially, that you have now, namely, the adding on to the water rate?

Mr. MILLER: Yes, sir.

Mr. COTTON: Or what you regarded as the rate from Portland to Bay points?

Mr. MILLER: Yes, sir.

Mr. COTTON: It might have met water competition, and it might not, just depending on what the rates were?

Mr. MILLER: Yes, sir.

395 Mr. COTTON: Do you know what the charter rates were in 1900 as compared with the charter rates now, as an average proposition? Were they higher or lower?

Mr. MILLER: I don't know what the charter rate was in 1900.

Mr. COTTON: It has been testified to by some of the other people. Do you know what the grade is over the elevation where you cross the Siskiyou Mountains, how many feet it is?

Mr. MILLER: There is a maximum grade there of 174 feet to the mile.

Mr. COTTON: What elevation do you reach?

Mr. MILLER: About forty-one hundred feet, in crossing the Siskiyou.

Mr. COTTON: Have you been over there on passenger trains?

Mr. MILLER: Yes, sir.

Mr. COTTON: How many engines does it take to pull a passenger train of 12 cars up that hill; that is, of the class of engines they are using there?

Mr. MILLER: Three engines.

Mr. COTTON: State whether or not you have ever regarded
396 this \$3.10 rate as *renumerative* of affording any compensation to the company, and what, if any discussion you have had about this rate with shippers and if so, whom and when?

Mr. MILLER: I have never regarded the rate as *renumerative*. I have had discussions with a number of the shippers. I have advised them that I thought the rate was unreasonably low. I recall one conversation in particular with Mr. Booth, which I had with him in 1900 or 1901, during a trip I had made over the line, my initial trip over the Southern Pacific. I told him the rate was very low, and I thought he had better devote his attention to the eastern business, because I did not think that rate would continue indefinitely to California.

Mr. COTTON: When were the rates to the east, points east of Colorado, extended into the Willamette Valley, in what year?

Mr. MILLER: Well, they were in effect to Colorado in 1901. They may have been in effect to Colorado prior to that time, but I can't say.

Mr. COTTON: When were they extended to points east of Colorado?

Mr. MILLER: They were established to the Missouri River on July 15, 1901, and they were established to Chicago and St.
397 Louis on July 15, 1901, but were cancelled, withdrawn, very soon thereafter via the Southern route, that is, via Shasta. For what reason they were withdrawn at that time, I don't know.

Mr. COTTON: When you extended them to the Missouri River, of course that took them into the entire territory east of the Missouri River?

Mr. MILLER: I am referring to the movement now south through Ashland. They were established via Portland—from the Willamette Valley to Utah, Colorado, Nebraska and Kansas on August 24, 1901.

Commissioner PROUTY: This rate from Willamette Valley is the same as the rate from Portland to Colorado common points?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: Is it the same to Salt Lake City?

Mr. MILLER: Yes, sir.

Commissioner PROUTY: There is a territory west of Pocatello in which it is not the same?

Mr. MILLER: Yes, sir.

Mr. TEAL: It applies to all territory taking the forty cent rate or
398 higher, Mr. Prouty. I will say in regard to that that prior to the time the rate was reduced to four dollars, I see from a memorandum I have here it was five dollars from Portland

and East Portland to San Francisco, Oakland and Vallejo Junction. That was up to sometime in April or May, 1898. I have not the tariff reference, but the memorandum shows that fact, and it was reduced to four dollars in June. I would like to have the right to refer to these tariffs to show the exact history of the rates. They are all on file.

Mr. COTTON: It all appears from the tariffs on file with the Commission. Mr. Miller, prior to some date in 1901, which I have now lost—

Mr. MILLER: August 24th.

Mr. COTTON: There were no rates in effect from this Willamette Valley territory to Colorado or to points east of Colorado?

Mr. MILLER: Not via Portland.

Mr. COTTON: Well, were there via San Francisco to points east of Colorado?

Mr. MILLER: Yes, sir.

Mr. COTTON: How long prior to this date in 1901—I am not taking August; I am taking the earliest dates, you gave.

399 **Mr. MILLER:** Well, they were in effect via Ashland to Utah, Colorado, Nebraska and Kansas on August 24, 1901. How much earlier than that. I don't know.

Commissioner PROUTY: Were those rates the same as from Portland?

Mr. MILLER: I think they were; yes, sir.

Mr. COTTON: I wish you would investigate and file a little statement showing the fact in that regard.

Commissioner PROUTY: When those rates were first put in, when they were taken out, and whether they were the same as the Portland rates.

Mr. COTTON: I want to show, because everybody seems to be a little hazy about it—I noticed Mr. Dixon was a little uncertain, and all the rest of us are—the exact history as to that.

400 **Mr. MILLER:** speaking generally, has the empty car haul as you have known it been north or south from this Willamette territory—speaking generally. I do not care about figures just now, because I am going to furnish the exact figures.

Mr. MILLER: On traffic through Ashland, it has been north.

Mr. COTTON: To any considerable preponderance, north always?

Mr. MILLER: Yes sir.

Mr. COTTON: Well, speaking generally, what relation would you think the north-bound empty car haul preponderated?

Mr. MILLER: The preponderance of tonnage is very much in excess south-bound. For every three loaded cars south bound, I think we haul one empty north.

Mr. COTTON: Has that always been true substantially since you have known the road?

Mr. MILLER: The preponderance has always been very much south-bound.

Mr. COTTON: That is, the preponderance of loads?

Mr. MILLER: Yes sir.

401 Mr. COTTON: There has been no substantial change in these later years, has there, specially, one way or the other?

Mr. MILLER: No; I don't think there has.

Mr. COTTON: Why is that? Why has that preponderance always been southbound?

Mr. MILLER: That is due to the fact that there is a considerable volume of tonnage moving from the Willamette Valley into California by rail, but little tonnage moving from California into the Willamette Valley by rail.

Mr. COTTON: By the Willamette Valley, do you include Portland, or exclude it?

Mr. MILLER: We include Portland.

Mr. COTTON: That is in the statement?

Mr. MILLER: Yes sir.

Mr. COTTON: How does most of your merchandise from California get to Portland?

Mr. MILLER: It moves by water.

Mr. COTTON: And so this lumber has not increased its outbound tonnage, or has it?

Mr. MILLER: It has very materially increased the south-
402 bound tonnage.

Mr. COTTON: That is, it has increased it, has it?

Mr. MILLER: Yes sir.

Mr. COTTON: But at all times the preponderance has been strongly southbound?

Mr. TEAL: You meant to ask him if it had increased the north-bound tonnage, did you not?

Mr. COTTON: No.

Mr. TEAL: Yes; you meant whether it had increased the merchandise movement north; did you not?

Mr. COTTON: No; I meant whether it had increased the preponderance of the loads south-bound.

Mr. MILLER: Yes sir; it has increased the preponderance south-bound very materially.

Mr. COTTON: Can you estimate about how many empties you have to haul for your loads now? About one out of three?

Mr. MILLER: About one out of three. I will tell you definitely in a moment. Yes sir; for every three carloads sent south, we haul one empty north.

Mr. COTTON: I have here a statement showing the rate per ton per mile and the distances from San Francisco to Albany,
403 Coburg, Springfield, Newburg and Cottage Grove, over which the traffic moves?

Mr. MILLER: Yes sir.

Mr. COTTON: I will have that copied in. It may be more convenient to have it in the record. It is just to save a little calculation, Mr. Teal.

Mr. TEAL: Yes. May I ask whether this is on the \$3.10 scale or on the new rate?

Mr. MILLER: The new rate.

Mr. TEAL: It does not show in this statement.

The paper referred to is as follows:

"16. The following points may be considered as fairly representing the average distance hauled:

Elevation.		Distance to San Francisco.	Rate per ton per mile.
240 ft.	Albany.....	666	.0075
475 "	Springfield.....	623	.008
340 "	Dallas.....	708	.007
193 "	Newberg.....	739	.0067
669 "	Cottage Grove.....	602	.0083
Average		668	.0075

Mr. COTTON: Mr. Miller, I see in 1906 for example you
404 received at Ashland 7589 empties? Is that right?

Mr. MILLER: Yes sir.

Mr. COTTON: And delivered to them 690 empties?

Mr. MILLER: Yes sir.

Mr. COTTON: You therefore received something over ten times
as many empties as you delivered to them.

Mr. MILLER: Yes sir; but the empties—

Mr. COTTON: I was going to ask you what those 690 empties
were, and why they went back empty?

Mr. MILLER: They were almost entirely tank cars that came up
with fuel oil.

Commissioner PROUTY: That is your own oil, your own fuel?

Mr. MILLER: Not altogether, no sir. I think most of our own oil,
or a considerable part of it, is delivered to us at Portland from tank
steamers.

Mr. COTTON: Have we over at St. Johns large oil tanks?

Mr. MILLER: Yes sir.

Mr. COTTON: Do you know what the capacity is?

Mr. MILLER: No, I do not, but they are very large tanks.

Mr. COTTON: And to those tanks, state what is delivered
405 and how it gets there?

Mr. MILLER: Oil at those tanks is delivered by vessel from
California, pumped into these tanks, and then when the oil is ship-
ped out by rail, it is run into the tank cars?

Mr. COTTON: Do we get our oil supply there? Do we have our
own tanks there?

Mr. MILLER: No; we do not. Our oil has been supplied by these
companies there, the oil having been transported by steamers into
these tanks, and we also receive some oil by rail from California.

Mr. COTTON: Yes, but I am talking about the fuel oil supply
which we use on the O. R. & N., to the extent that we use it, and the
fuel oil supply which we use out of Portland.

Mr. MILLER: Of course the situation of the O. R. & N. is some-
what different. I was referring to the Southern Pacific.

Mr. COTTON: I am talking now about the fuel oil supply which is

used on both roads. We burn some fuel oil on the O. R. & N., do we not?

Mr. MILLER: Yes sir.

406 Mr. COTTON: In the engines?

Mr. MILLER: Yes sir.

Mr. COTTON: How does that get to Portland?

Mr. MILLER: Most of that oil comes up by rail from San Francisco, and some of it is secured at Albino where the oil is delivered by steamer into these tanks.

Mr. COTTON: The bulk of it is intended to come which way, if you know?

Mr. MILLER: The bulk of that oil, I think moves up by steamer into the tanks.

Mr. COTTON: Do you know where the oil comes from?

Mr. MILLER: Well, some of it has come from Richmond, in California.

Mr. COTTON: Where is Richmond?

Mr. MILLER: Across the Bay from San Francisco and a very large part of it has come from the Associated Oil Company, whose wells are located in the interior of California, moved by rail.

Mr. COTTON: So the Southern Pacific and O. R. & N. are burning at Portland a fuel oil supply which reaches Portland by steamer and not by rail, as a rule?

Mr. MILLER: Yes sir.

Mr. COTTON: Why do they not transport it by rail?

407 Mr. MILLER: Because it can be transported by steamer on a lower basis. Most of the oil moves by water.

Mr. COTTON: Then you do not undertake to compete with the steamers for your own fuel supply on these roads?

Mr. MILLER: No; I think not.

Mr. COTTON: These big tanks are located on the water, on the Willamette River?

Mr. MILLER: Yes sir.

Mr. COTTON: Located on the St. Johns branch of the O. R. & N.?

Mr. MILLER: Yes sir.

Mr. COTTON: Do we not own our own tanks there?

Mr. MILLER: I don't know, but I think not.

Mr. COTTON: I would like to show that we do. I thought Mr. Miller was familiar with those facts. I know them, and I would like, with Mr. Teal's permission, to produce an affidavit to show the oil contracts.

Commissioner PROUTY: What do you understand the fact is, Mr. Cotton?

Mr. COTTON: I understand the fact is—I would just as soon testify to it.

Commissioner PROUTY: Just state it.

408 Mr. COTTON: I understand the fact is that the intention was to move that stuff by water, that is, to Portland. Of course further south it was intended to move it by rail, say to Roseburg and Ashland; but up there it was intended to move it by water for the O. R. & N. and Southern Pacific. Therefore we contracted

to build our tanks, the stuff to be transported to these tanks by steamer.

Commissioner PROUTY: But you own your own tanks there?

Mr. COTTON: Yes sir.

Commissioner PROUTY: Do you understand **most of the oil taken** onto the engines at Portland is brought there by water?

Mr. COTTON: I think the bulk of it came there by water, but a quantity of it came there by rail, owing to the fact that the steamer did not come in as promptly as it should, and did not give us as good service. We had a low price from the oil company, and the commercial price in Portland and Seattle caused the oil companies to hold back deliveries, and we had to transport some by rail.

Commissioner PROUTY: Mr. Teal, you do not care to have
409 that corroborated by an affidavit?

Mr. TEAL: Not at all; neither by his oath or anything else.

Commissioner PROUTY: Let it stand as a statement of fact.

Mr. COTTON: I just want to show the general fact that we do not want to try to meet water competition on that kind of stuff. Mr. Miller, do you know anything about the character of the Southern Pacific line through Cow Creek Canyon?

Mr. MILLER: Yes sir.

Commissioner PROUTY: Whereabouts is that?

Mr. MILLER: That is down about 275 miles south of Portland. It is between what we call the Umpqua Valley and the Rogue River Valley.

Commissioner PROUTY: Is that near Portland?

Mr. MILLER: Yes sir.

Commissioner PROUTY: Which side of Ashland?

Mr. MILLER: It is north of Ashland, between Roseburg and Ashland—between Roseburg and Grand Pass.

Mr. COTTON: What about the physical features of the road through that Cow Creek Canyon, as to operations?

410 Mr. MILLER: Well, the road goes through a very narrow Canyon. The Creek is very swift. **Frequently during the** winter months it gets very high and tears out the banks. The road has occupied both sides of the river, being obliged to move from one side to the other on account of the washouts and slides. It is a very bad piece of road.

Mr. COTTON: Do you know what the distance is over which these difficulties are experienced?

Mr. MILLER: Yes sir; I can tell you. 25 to 30 miles will take us through the canyon.

Mr. COTTON: Are these difficulties you refer to peculiar to special years?

Mr. MILLER: No; we have trouble there nearly every year, from either high water, or from slides and washouts.

Mr. COTTON: Washed out during what seasons of the year?

Mr. MILLER: Usually in the winter months.

Mr. COTTON: Any particular special month in the winter?

Mr. MILLER: No; it runs through the winter, usually.

Mr. COTTON: Taking down to the Willamette Valley proper, through Eugene and Santiam, down in the flat country, do you have any water difficulties?

Mr. MILLER: Yes sir.

Mr. COTTON: Is that unusual?

Mr. MILLER: No; we frequently have trouble there from water troubles.

Mr. COTTON: How many bridges did you lose last year; do you know?

Mr. MILLER: Well, we lost the bridge across the Santiam.

Mr. TEAL: Was that when they were building it?

Mr. MILLER: I think that bridge was being rebuilt at the time; but the bridge went out, and has not since been rebuilt.

Mr. COTTON: Did you lose a bridge in the vicinity of Jefferson?

Mr. MILLER: Yes; there was trouble there on the Willamette.

Mr. COTTON: How big a bridge is this bridge at Jefferson, for example? Is it a steel bridge?

Mr. MILLER: I don't know whether the bridge at Jefferson was a steel bridge or not. The one across the Santiam was a wooden
412 bridge.

Mr. TEAL: You have got two bridges, one across the Santiam and one across the Jefferson. Will you please tell me what is the difference between the Santiam bridge and the Jefferson bridge? Are they not the same bridge?

Mr. MILLER: No; the Santiam Bridge I refer to is over on the Woodburn-Springfield branch.

Mr. COTTON: That is between Crabtree and Tallman, Mr. Teal. That bridge went out too, and has never been replaced. They are both over the Santiam, but we have been in the habit in our correspondence of calling one the Santiam bridge and the other the Jefferson bridge, in order to distinguish them conveniently, without using so much circumlocution. Do you know about the length of this bridge at Jefferson, Mr. Miller?

Mr. MILLER: I don't just recall that bridge at Jefferson, the length of it and character of its construction.

Mr. COTTON: You do not know the length?

Mr. MILLER: No.

Mr. COTTON: Would you undertake to guess at it?

Mr. MILLER: No; I would not.

413 Mr. COTTON: You have washouts then through the Willamette Valley?

Mr. MILLER: Yes sir.

Mr. COTTON: That is, the creeks and rivers or small rivers. They are not large rivers, are they?

Mr. MILLER: No; outside of the Willamette. The others are small in the Willamette Valley.

Mr. COTTON: All those streams rise in the mountain districts, do they not?

Mr. MILLER: Yes sir.

Mr. COTTON: And for that reason they have more or less tendency

to floods, all through down on that road until you get through the Cow Creek Canyon?

Mr. MILLER: Yes.

Mr. COTTON: Do you have high water in the Willamette Valley, impending your operations, in the vicinity of Oregon City?

Mr. MILLER: Well, not at Oregon City. I don't know that the high water there has ever troubled us, by rail.

Mr. COTTON: You run through that water? It is back water?

414 Mr. MILLER: At Oregon City?

Mr. COTTON: Yes.

Mr. TEAL: I will admit, Mr. Cotton, that two or three times there was backwater there. That is all it amounts to. It is back water.

Mr. COTTON: But it took a big gang of men, and we ran in water to the car steps, for two or three weeks.

Commissioner PROUTY: Don't take up unnecessary time with that, Mr. Cotton.

Mr. COTTON: It is practically a flood country all through that territory, to a very great extent?

Mr. MILLER: Yes; the water gets very high there.

Mr. COTTON: How about gathering up these loads and taking them down to California from this Willamette Valley territory. Does the movement come in large quantities and regularly from all these small mills scattered throughout the valley?

Mr. MILLER: No; the movement spreads over the whole year. It ran last year about 7,000 cars south through Ashland.

Commissioner PROUTY: It is a pretty regular movement, Mr. Miller?

415 Mr. MILLER: Well, no. It is heavier at times than it is at other times, although we transport lumber down there the entire year, but it is heavier at sometimes than it is at other times.

Mr. COTTON: I mean does it come regularly from these mills? Where are these mills situated? In the valley proper? Just describe the Willamette Valley down to say, Albany. Is that an agricultural country or a wooded country, along the main line of the Southern Pacific?

Mr. MILLER: That is an agricultural country.

Mr. COTTON: Extending as an agricultural country generally for about how many miles on each side of the main line, would you say?

Mr. MILLER: Down to Eugene, which is at the head of the Willamette Valley, about 125 miles.

Mr. COTTON: How far does the agricultural country spread out on each side of the main line?

Mr. MILLER: From four to ten or 12 miles.

Mr. COTTON: Does this Woodburn line down here, off on this side (indicating), run through an agricultural country or a wooded country?

416 Mr. MILLER: Well, both.

Mr. COTTON: Where is the wooded end of it?

Mr. MILLER: The southern part of it runs through more or less timber, timber reasonably close.

Mr. COTTON: And the northern end?

Mr. MILLER: Well, there is some timber in the northern end. There are mills located there.

Mr. COTTON: Large or small?

Mr. MILLER: They are small mills.

Mr. COTTON: Now, about this Corvallis line. Is that line down to Corvallis an agricultural country or a wooded country?

Mr. MILLER: That is an agricultural country.

Mr. COTTON: You get this lumber from these mills except Salem either on the extreme east side or the extreme west side. Is not that about the fact?

Mr. MILLER: Yes.

Mr. COTTON: I am speaking generally. I am trying to get a general notion of the country. Mr. Miles, I understand, has a mill at Salem to which he pulls logs in?

Mr. MILLER: Yes sir.

417 Mr. COTTON: But that is not true of people otherwise along the main line of the Southern Pacific, until you get down to pretty nearly the head of the Valley?

Mr. MILLER: That is true.

Mr. TEAL: I think Mr. Dixon testified the timber region was on each side of the valley.

Mr. COTTON: That is true, but I wanted to get it specifically with relation to the line.

Mr. TEAL: There is no question about that.

Mr. COTTON: Then in gathering this lumber, what kind of service do you perform; branch line service, or main line service?

Mr. MILLER: Well, from the Woodburn-Springfield branch and the west side branches, of course it is branch line service up to the main line.

Commissioner PROUTY: Do you think there is any reason why a higher rate should be applied on the west side than upon the east side:

Mr. MILLER: Yes; I do.

Commissioner PROUTY: You think your old adjustment, applying 25 cents a ton higher, is reasonable, do you?

Mr. MILLER: Yes sir.

418 Mr. COTTON: Will you state why?

Mr. MILLER: Because if we use the Corvallis & Eastern road to get to the main line, we are obliged to pay the Corvallis and Eastern 25 cents a ton for the transfer from the west side to the east sidelines.

Commissioner PROUTY: Is that true now?

Mr. MILLER: Yes sir; that is true to-day. Or, in the event that we don't care to use the Corvallis and Eastern for that service, we bring the business into Portland and then take it south on the main line.

Commissioner PROUTY: There would be a back pull there?

Mr. MILLER: Yes sir; but rather than perform that back haul we

take the business around and deliver it to the Corvallis and Eastern for the transfer and pay them 25 cents a ton for that service.

Mr. COTTON: You took it around by the Corvallis & Eastern for how many years, and paid them this 25 cents?

Mr. MILLER: That arrangement has been in effect for a number of years.

Mr. COTTON: Do you regard it as a reasonable charge for the use on their road?

419 Mr. MILLER: Yes; I do. They charge us higher than that on traffic other than lumber.

Mr. COTTON: What do they charge you on traffic other than lumber?

Mr. MILLER: 40 cents per ton, I think.

Commissioner PROUTY: How many miles do they haul the traffic?

Mr. MILLER: About 11 or 12 miles.

Mr. COTTON: You understand that somebody connected with the Harriman interest has purchased the Corvallis & Eastern?

Mr. MILLER: Yes sir.

Mr. COTTON: Do you see any particular reason why the Corvallis & Eastern's revenues should be shrunk that much just to get this stuff off the west side easily? ?

Mr. MILLER: As General Freight Agent of the Corvallis & Eastern, I don't think I would carry the freight free for the Southern Pacific.

Mr. COTTON: Mr. Teal laughs, but do you see any particular reason why——

Mr. TEAL: You don't know what I was laughing at.

Mr. COTTON: I assume you laughed because the general
420 feeling is that every time a big road buys a branch, they must throw away every branch line revenue that the former one would have gotten.

Mr. MILLER: There is absolutely no reason why the Corvallis & Eastern Road should perform any service for the Southern Pacific in connection with the handling of commercial traffic at less than what would be a reasonable rate for the service performed?

Commissioner PROUTY: Is that road still operating independently?

Mr. MILLER: It is operating independently, but by the officers of the Southern Pacific Company. Its accounts are separate, and it is a separate concern.

Mr. COTTON: Now take the Jefferson street line. How do you hook the Jefferson street line up with the main line of the Southern Pacific? How do you have to get freight out of there?

Mr. MILLER: We bring that freight to Portland——

Commissioner PROUTY: Is the Jefferson Street Line on the east side or west side?

Mr. MILLER: It is on the west side.

Mr. COTTON: It is the line nearest the river.

421 Mr. MILLER: We either take it over to the west side division and bring it into Portland, or we take it south into Corvallis and Albany, in connection with the Corvallis & Eastern.

Commissioner PROUTY: This high rate is applied to the Jefferson Street line as well as the east side, is it?

Mr. MILLER: Yes, sir; or we take the freight to Monmouth and handle it in connection with Independence, in connection with the Independence & Monmouth road.

Mr. COTTON: Now, down here at the south end of your road you built what we call the Springfield cut-off, did you not?

Mr. MILLER: Yes sir.

Mr. COTTON: That is the line that connects this extreme east side line with the main line of the Southern Pacific. Did that require the construction of a bridge in order to connect those two?

Mr. MILLER: It did, across the Willamette River.

Mr. COTTON: Do you know, from recollection, how much that line cost?

Mr. MILLER: No, I do not.

422 Mr. COTTON: I would like to file a statement in regard to that. It is quite an extensive bridge, is it not, Mr. Booth?

Mr. BOOTH: Yes sir; it is. It is two old bridges brought together and used together.

Mr. COTTON: But I refer to the construction.

Mr. BOOTH: The length of the bridge is about 400 feet.

Mr. TEAL: It cost, as I remember it, between \$300,000 and \$400,000. Mr. COTTON makes fun of my statistics, but I think I can tell what it cost.

Mr. COTTON: I think the line altogether cost about \$500,000 to build over there. Take it up at Oswego. Are they building a connecting line so as to get a more convenient connection from the west side lines over to the Southern Pacific?

Mr. MILLER: Yes sir.

Mr. COTTON: They are building how many miles over at Beaverton, over to the other line?

Mr. MILLER: They are building from Beaverton across the river to connect with the east side line. I don't know how much is involved in that line.

423 Mr. COTTON: That involves the construction of a bridge across the Willamette River near Portland?

Mr. MILLER: Yes sir.

Mr. COTTON: I would like to file a statement as to the cost of that construction. The point I am trying to illustrate, your Honors, is either that there must be increased money spent in order to conveniently get this traffic out of the country without taking it all the way around Robin Hood's barn, or else increased service must be performed. To get that timber out, we have got to get it off these extreme east and west side lines and get it onto the main line in some convenient way.

Mr. TEAL: It is simply to cheapen operating expenses and make it more convenient to tie up the two lines, is it not, Mr. Cotton?

Mr. COTTON: Yes; but as we cheapen these operating expenses, we are necessarily going to throw away certain mileage on the road over which traffic does not move.

Mr. TEAL: I do not think the shippers have anything to do with that.

Mr. COTTON: I think that is purely a matter of argument.
424 I understand you make a rate of 15 cents north on sugar, Mr. Miller. Why is that made?

Commissioner PROUTY: He did not say he made a rate of 15 cents. He said there was a water rate of 15 cents, and he thought his was a little higher.

Mr. COTTON: Do you remember what your rate is on sugar to Portland?

Mr. MILLER: 15½ cents a hundred, as I recall.

Mr. COTTON: Why do you make that rate north?

Mr. MILLER: Because of the water rate.

Mr. COTTON: Where do you meet water competition on sugar?

Mr. MILLER: Well, we carry the north-bound business, traffic like that, at a very low rate, because it serves to load cars that we would otherwise bring empty.

Mr. COTTON: Do all the troubles connected with the operation of this line end when you get to the top of the mountain, or do they have difficulties farther south? That is, the top of the Siskiyou Mountain.

Mr. MILLER: There is another summit after we get to Siskiyou, and then down through the Sacramento Canyon is a very difficult piece of road to operate.

Mr. COTTON: Riding down in the day time, taking the
425 night train out of Portland, you get to Ashland in the morning, do you not?

Mr. MILLER: Yes sir; about noon.

Mr. COTTON: And you ride in the mountains about how long on a passenger train; about how many miles?

Mr. MILLER: You ride all day, certainly, down to Dunsmuir.

Mr. COTTON: Then when you get down to Dunsmuir, you strike what stream?

Mr. MILLER: The Sacramento River.

Mr. COTTON: The headwaters of it?

Mr. MILLER: Yes sir.

Mr. COTTON: And what is the character of the road down through the headwaters of the Sacramento?

Mr. MILLER: Well, up to Dunsmuir, as I say, it is a very bad piece of road, a difficult piece of road to operate.

Mr. COTTON: And from Dunsmuir south?

Mr. MILLER: From Dunsmuir south is a pretty good country. It is a fairly good road until you get a few miles south of Dunsmuir, down to Reading or Red Bluff.

426 Mr. COTTON: What is the character of the Sacramento River there in the vicinity of Dunsmuir?

Mr. MILLER: Well, that is a pretty wild stream, the headwaters of the Sacramento. It is a rough country.

Mr. COTTON: Subject to any difficulties in operation there?

Mr. MILLER: Well, I should imagine so. I am not so familiar with the actual operation there, but I should imagine it was a difficult piece of road to operate.

Commissioner PROUTY: Mr. Miller, going south from Ashland, where is the next divisional point?

Mr. MILLER: Dunsmuir.

Commissioner PROUTY: You operate the road between Ashland and Dunsmuir as one division?

Mr. MILLER: Yes sir.

Commissioner PROUTY: Would a solid freight train be hauled from Ashland to Dunsmuir, or would you alter the makeup of that train at some intermediate point?

Mr. MILLER: The train would have to be split because of the grades.

Commissioner PROUTY: That is to say, the train you take out of Ashland would not be hauled as a solid train all the way through to Dunsmuir?

427 Mr. MILLER: No; I think not.

Cross-examination:

Mr. TEAL: Mr. Miller, you testified that in 1900 and 1901 for nine months you were connected with the Southern Pacific directly in Oregon?

Mr. MILLER: Yes sir.

Mr. TEAL: And that since 1901 you are practically the traffic agent in Oregon of both lines, the O. R. & N. and the Southern Pacific?

Mr. MILLER: Yes sir.

Mr. TEAL: You also said that you were familiar with the business of the Southern Pacific Railway Company?

Mr. MILLER: Yes sir.

Mr. TEAL: I am speaking of Oregon.

Mr. MILLER: Yes sir.

Mr. TEAL: I would like to ask you, briefly, whether or not since 1899 the earnings of the Oregon and California Railroad in the state of Oregon have not very largely increased?

Mr. MILLER: I think they have.

428 Mr. TEAL: I will not ask you for the exact figures. I will ask you whether or not its road bed has not been improved?

Mr. MILLER: Yes sir, it has.

Mr. TEAL: New rails laid?

Mr. MILLER: Yes sir.

Mr. TEAL: That you use larger locomotives?

Mr. MILLER: Yes sir.

Mr. TEAL: That you have higher minimums in lumber, do you not?

Mr. MILLER: Yes; the minimum weights in that line have been increased.

Commissioner PROUTY: Did this new arrangement in minimums apply on the Southern Pacific?

Mr. MILLER: The arrangement as to minimum weights on lumber on the Southern Pacific are entirely different from the arrangement with respect to eastern business.

Mr. TEAL: As a matter of fact, the train loads have increased, have they not over the Southern Pacific?

Mr. MILLER: Yes sir.

Mr. TEAL: And the amount in the car and the load, is generally very much improved, is it not, over what it was in 429 1901?

Mr. MILLER: Yes sir.

Mr. TEAL: Very much heavier trains are run?

Mr. MILLER: Yes sir.

Mr. TEAL: I believe you testified that the movement of the empties has always been north bound?

Mr. MILLER: It has been since the period you mentioned.

Mr. TEAL: That is what I mean. In 1899, as I remember, this \$3.10 rate was first put in?

Mr. MILLER: Yes sir.

Mr. TEAL: And in 1898, prior to April 25th, 1898, there had not been a rate, as I understand you to say, that you could remember out of the Willamette Valley for lumber, for interstate business?

Mr. MILLER: Yes; a memorandum I have does not show any rate prior to that time, and doubt very much if there was any.

Mr. TEAL: There was no movement, was there?

Mr. MILLER: There was no movement to California.

Mr. TEAL: And very little except local?

430 Mr. MILLER: 2100 cars moved south through Ashland in 1898.

Mr. TEAL: That was after the \$4 rate was put in, about which Mr. Booth testified?

Mr. MILLER: That was destined largely to Utah and Nevada points.

Mr. TEAL: That is what Mr. Booth said.

Mr. MILLER: Yes.

Mr. TEAL: But that is when this lumber movement commenced.

Mr. MILLER: 1898; yes.

Mr. TEAL: Now, was Cow Creek Canyon operated then?

Mr. MILLER: Yes sir.

Mr. TEAL: And the Sacramento River ran down hill?

Mr. MILLER: Yes sir.

Mr. TEAL: And the Siskiyou Mountains were there just the same, were they not?

Mr. MILLER: Yes sir.

Mr. COTTON: We concede all of that, may it please the Commission. The physical conditions of the road have not changed.

Mr. TEAL: Mr. Miller, in connection with the Oregon & California Railroad—

431 Mr. COTTON: I want to have established very early the principle, and I would like to have Mr. Teal establish it, that because we ever make a low rate, we have got to stay with it always. I think that would be a useful principle to establish in Oregon.

Mr. TEAL: Don't get agitated. I was asking a few questions about the physical conditions.

Mr. COTTON: I concede all that. You can save time on that.

Mr. TEAL: There are one or two things I want to ask about the Oregon & California. You spoke about the operation of the Oregon & California Railroad through the Willamette Valley, Mr. Miller?

Mr. MILLER: Yes sir.

Mr. TEAL: Do you want the Commission to understand by what you said that that is a hard road to operate or an easy road to operate?

Mr. MILLER: I said we frequently had troubled there from water—water troubles, washouts.

Mr. TEAL: That road has been there over 35 years, has it not, operated in that valley? It is an old road, is it not?

Mr. MILLER: Yes; it has been there that long.

432 Mr. TEAL: The oldest road in Oregon?

Mr. MILLER: Part of the Southern Pacific lines in Oregon, of course, are the oldest roads in Oregon.

Mr. TEAL: Mr. Miller, I have not had time to examine your figures about the car movement south into the territory that it went into, but taking your figures as accurate, I did notice that from the valley in 1906, out of what you stated was 3407 carloads of commercial movement of lumber, 1494 did go into those San Francisco Bay points proper.

Mr. MILLER: San Francisco Bay points too, 1494 cars in 1906.

Mr. TEAL: And 391 more went to the other territory immediately adjacent?

Mr. MILLER: Yes sir.

Mr. TEAL: In other words, out of the car shipments, according to your statement, from the Willamette Valley, nearly 60 per cent. of it went right into this affected territory, regardless of the number in that neighborhood, did it not?

Mr. MILLER: Now, let us see.

433 Mr. TEAL: There were 1885 cars went into it, and you say 3,407 moved to California points?

Mr. MILLER: No; I think you have those figures confused. There were 1494 cars to San Francisco Bay points, and 391 to the adjacent territory that took \$5 or lower.

Mr. TEAL: Yes.

Mr. MILLER: There were 1363 cars to other California points and 159 cars to Utah, Nevada and Arizona, and a movement of 6395 cars through Portland.

Mr. TEAL: I am speaking of the California points. That shows there were 1523 cars out of 3407 that went to Nevada and other points in California than those affected by this rate from the Willamette Valley points.

Mr. MILLER: Well, there were 1885 cars shipped in 1906 to the territory affected by the advance of April 17, 1907.

Mr. TEAL: Now, during the year 1906 was there not a very severe car shortage in the Willamette Valley?

Mr. MILLER: Yes, sir.

Mr. TEAL: And were you able to supply the demands of the shippers for the lumber that they desired to ship worth?

Mr. MILLER: We were not.

434 Mr. TEAL: Did that not obtain all through 1907, this year?

Mr. MILLER: Well, it was true for the greater part of 1907; yes.

Mr. TEAL: In this movement here that you referred to, you did not put in Company material that was moved?

Mr. MILLER: No; this is commercial business.

Mr. TEAL: You spoke of business being done at Glendale and Cottage Grove and Dallas and such places as that. Taking places like Falls City in the Willamette Valley, there are five or six saw-mills there, are there not?

Mr. MILLER: There are several saw mills.

Mr. TEAL: Does it do any other business than that which is the outgrowth of the lumber business, using that as an illustration?

Mr. MILLER: Well, they handle some passenger traffic and some little merchandise traffic from Dallas.

Mr. TEAL: It is all a result of the lumber mills there, is it not?

Mr. MILLER: I don't know whether it is altogether a result of that, because there has been a little town there at Falls City
435 for some time, but I think the most of the business is the result of the lumber industry.

Mr. TEAL: Taking points like Cottage Grove and places of that character, where you are doing this local business, have they not within your own knowledge been largely built up by the lumber business? Has it not been a very potent factor in building up your business otherwise in the Willamette Valley?

Mr. MILLER: I think it has been a very potent factor in connection with the development of the country and in connection with the development of the business.

Mr. TEAL: Prior to what is known as the merger, Mr. Miller, by which we mean—I guess we all know what it means—how did the lumber move from the Willamette Valley?

Mr. MILLER: It moved south through Ashland.

Mr. TEAL: And it moved east over the Southern Pacific, did it not?

Mr. MILLER: Yes, to certain territories.

Mr. TEAL: At that time, the Southern Pacific as then constituted had no rates north that would enable it to go that way at all, had they?

Mr. MILLER: No sir.

436 Mr. MILLER: They insisted upon getting this haul south, did they not?

Mr. MILLER: That is the way the business moves. It did not go through Portland.

Mr. TEAL: And could not move through Portland?

Mr. MILLER: Well, there were no through rates, via Portland.

Mr. TEAL: Can you tell me the distance from Eugene to Denver? Let me ask you this, whether at that time the freight rate to Denver was not 40 cents to Eugene. Don't you remember?

Mr. MILLER: Via Ashland it was; yes sir. I think so.

Commissioner COCKRELL: Via what route?

Mr. MILLER: Via the Southern Pacific, through Ashland.

Mr. TEAL: According to my figures, from Eugene to Sacramento is 518 miles. It then moves from Sacramento to Ogden, 697 miles; from Ogden to Denver, 779 miles; or 2,034 miles. Now, at that time the rates were put into effect volutarily for that distance of 40 cents.

I will ask you if that was not a lower rate per ton per mile
437 than any rate affecting the lumber interests under this old tariff from the State of Oregon to the points in dispute.

Mr. MILLER: What is the distance you make it?

Mr. TEAL: 2,034 miles, 40 cents a hundred. I have a purpose in showing this. It is \$3.90 per ton per mile, in round number, is it not?

Commissioner PROUTY: Any of us can make the computation on a distance chart.

Mr. COTTON: Have you those distances there?

Mr. TEAL: You can correct the distances if they are not right.

Mr. COTTON: I wanted to know if you were taking them in a general way?

Mr. TEAL: No; I took them from the official Railway Guide.

Commissioner PROUTY: These figures are all subject to correction.

Mr. TEAL: I simply want to know if at that time that lumber coming out did not have to go up the Siskiyou?

Mr. MILLER: Yes, sir.

Mr. TEAL: And over the Sierra Nevadas?

438 Mr. MILLER: Yes sir.

Mr. TEAL: And taken to Ogden?

Mr. MILLER: Yes sir.

Mr. TEAL: And up on the Rio Grande Western?

Mr. MILLER: Yes sir.

Mr. TEAL: Then to the Denver & Rio Grande?

Mr. MILLER: Yes sir.

Mr. TEAL: Then 11000 feet over those mountains?

Mr. MILLER: 11,000 feet may be excessive, but of course there was a mountain haul.

Mr. TEAL: And then down into Denver?

Mr. MILLER: Yes sir.

Mr. TEAL: And the freight was considered desirable, and so desirable that they would not let it go north bound. Is not that true?

Mr. MILLER: Well, I don't know how the people at that time looked at the matter, but I don't see how they could have regarded any such rate as the reasonable rate.

Mr. TEAL: You know Mr. Markham, do you not?

Mr. MILLER: Very well, sir.

Mr. TEAL: Mr. Markham was considered, when he was
439 in the railroad business, one of the best railroad men we ever had in the west, was he not?

Mr. MILLER: Yes, indeed; he was a very good man.

Mr. TEAL: And he advanced rapidly until he got to the head of the Southern Pacific Company in California?

Mr. MILLER: He got to be General Manager of the Southern Pacific Company?

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Mr. TEAL: He had charge of the business in Oregon for many years, did he not?

Mr. MILLER: He was there, I think, about three years.

Mr. TEAL: These rates were in effect when he was there, were they not?

Mr. MILLER: What rates?

Mr. TEAL: This \$3.10 rate we are talking about.

Mr. MILLER: When he was there they were there; yes sir. In fact, he is the gentleman through whose influence the rate of \$3.10 was made.

Mr. TEAL: The basis of it was the development of the country in getting these industries started? You have often heard
440 him say that in your discussions with him, have you not?

Mr. MILLER: Well, the rate was made for the purpose of developing that business in the Willamette Valley.

Mr. TEAL: And getting the lumber business established, was it not?

Mr. MILLER: And placing those mills, so far as it might be practicable for the road to do it, on an equality with the mills located on tidewater.

Mr. TEAL: Have you figured out the average rate per ton per mile that you receive on lumber shipped from the Willamette Valley to all points in California?

Mr. MILLER: No; but I have figured out the average rate per ton per mile from certain points in the Willamette Valley to San Francisco.

Mr. TEAL: That is already in evidence. Can you give us the average rate per ton per mile upon all the Oregon and California lumber business?

Mr. MILLER: No; I cannot.

Mr. TEAL: You did furnish that for the O. R. & N. Company?

Mr. MILLER: Yes; but I haven't it for the Oregon & California.
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Mr. TEAL: Now, on the \$3.10 basis on this green lumber, do you know what the average from the west side points—the rate per ton per mile average is on the \$3.10 basis?

Mr. MILLER: No, I do not. I have never figured it.

Mr. TEAL: Of course we can submit these things with the argument, because the tariffs are all in effect; but I will ask you if the very lowest rate that you have on the \$3.10 basis does not get below 4.31 mills per ton per mile?

Mr. MILLER: I can't answer that, Mr. Teal, without making some figures.

Mr. TEAL: You do not know, then, and cannot say what your average rate per ton per mile is that you have been receiving on lumber hauled by the Oregon & California Railroad Company?

Mr. MILLER: No sir, I cannot.

Mr. TEAL: You cannot say what the average rate per ton per mile is that you receive on California business?

Mr. MILLER: I can't speak it out of my own mind; no.

442 Mr. TEAL: And you cannot give the average rate on the \$3.10 basis to Bay points?

Mr. MILLER: Now, just what do you mean by that?

Mr. TEAL: In arriving at these conclusions, you must have done some figuring. I say, take an average point in the Willamette Valley that you would call an average. Can you tell the Commission the rate per ton per mile in the San Francisco Bay points?

Mr. MILLER: Yes sir.

Mr. TEAL: How much?

Mr. MILLER: Now, take some point that you would like to have me furnish the information for, and I will endeavor to figure it.

Mr. TEAL: Eugene. No; don't do it now. Of course you can figure it.

Mr. COTTON: He can put in a statement of it.

Mr. TEAL: Of course he can put in a statement. So can I. I am trying to ascertain on what basis these rates were changed when he arrived at the conclusion of the basis of this rate. If he knows nothing about it, that is all I want.

Mr. MILLER: Substantially a half a cent a ton a mile.
443 Commissioner PROUTY: Which rate, the old or the new one?

Mr. MILLER: On the basis of \$3.10.

Mr. TEAL: Speaking of these ferries and one thing and another, that you have to cross in getting into San Francisco Bay, is there any insuperable objection to coming around by Niles, and not crossing those ferries at all?

Mr. MILLER: It can be done.

Mr. TEAL: Does not a great deal of freight move that way?

Mr. MILLER: I don't know, Mr. Teal: I expect it does, and a cut-off is now being built to avoid that ferry transfer.

Mr. TEAL: You also said you had to ferry all the Vallejo business. You did not mean that, did you?

Mr. MILLER: No.

Mr. TEAL: Then if you did make that statement you want to correct that?

Mr. MILLER: For Vallejo, yes, there may be a car ferry from the north.

444 Mr. TEAL: But how can there be a car ferry in Vallejo. It is on the north side of the strait.

Mr. MILLER: If it is on the north side, there is no transfer.

Mr. TEAL: So that if the movement was down past Benicia and carried across that way, and if it did not stop at Oakland, and went across the Bay, then there would be two ferries?

Mr. MILLER: Yes sir.

Mr. TEAL: But that is not necessary to get into San Francisco at all, or into Oakland, is it?

Mr. MILLER: Not absolutely necessary. The service can be performed to San Francisco without the Oakland transfer, by a very much longer haul.

Mr. TEAL: Mr. Miller, last year, all through 1903, after that fire which we have to refer to so often, and up to 1907, there was an extreme congestion of freight in and around San Francisco Bay points, was there not?

Mr. MILLER: Yes sir.

Mr. TEAL: And at one time there were 8,000 cars there piled up, were there not, Mr. Miller?

Mr. MILLER: Substantially that.

445 Mr. TEAL: That was the result of the tremendous inflow of merchandise and everything that was needed there for a destroyed city, was it not?

Mr. MILLER: Yes sir.

Mr. TEAL: That condition does not prevail to-day, does it?

Mr. MILLER: No.

Mr. TEAL: At that time it was exceedingly difficult for you to get cars at all up north, was it not?

Mr. MILLER: Yes sir.

Mr. TEAL: You had all kinds of trouble trying to serve your people?

Mr. MILLER: Yes sir.

Mr. TEAL: And it was while these conditions were in effect that I speak of, that this first notice was sent out, changing this rate, was it not?

Mr. MILLER: The notice was given last winter, sometime.

Mr. TEAL: I say those conditions still existed in San Francisco, then, did they not?

Mr. MILLER: Yes; there was —

446 Mr. TEAL: Of course not to the same degree. I don't mean that.

Mr. MILLER: There was a bad condition of affairs in San Francisco all last year?

Mr. TEAL: And it is getting straightened out now. The matter of the \$3.10 rate was taken up by the State Railway Commission, was it not, Mr. Miller?

Mr. MILLER: Yes sir.

Mr. TEAL: And you appeared there, did you not?

Mr. MILLER: Yes sir.

Mr. TEAL: They recommended that the rate be restored, did they not?

Mr. MILLER: They made a suggestion, I believe, that the rate not only be re-tored but applied to Portland and all points of the Southern Pacific Company's lines in Oregon.

Mr. TEAL: They went over the subject there at that time in that investigation?

Mr. MILLER: Yes sir.

Mr. TEAL: In connection with that empty movement—I don't want to take much time with it, but can you give any idea of how many empties you have to move to your own mills north-bound?

447 Mr. MILLER: No sir.

Mr. TEAL: But you moved no freight into those mills. That was just simply to take the lumber out, was it not?

Mr. MILLER: Yes; I don't think there was any merchandise moved into the points where these mills are operated; certainly not from the south, of any consequence.

Mr. TEAL: That is what I mean. The Southern Pacific Company are not running stores in there, are they?

Mr. MILLER: No.

Mr. TEAL: So that was a pure empty car movement from the south to these mills operated by the Company, for the purpose of loading their lumber and taking it south again?

Mr. MILLER: Yes sir.

Mr. TEAL: Now, in connection with the car movement last year and this year, were there any instructions issued by the Oregon & California road, so that no box cars were allowed to go south of Ashland?

Mr. MILLER: No sir.

448 Mr. TEAL: If they did go south of Ashland, what did they pay? Let us put in that way.

Mr. MILLER: There was an order issued——

Mr. COTTON: What was that question? I don't know what you mean by what they paid.

Mr. TEAL: What they paid locally.

Commissioner PROUTY: Let Mr. Miller answer the question.

The question was read as follows:

"If they did go south of Ashland, what did they pay? Let us put in that way."

449 Mr. MILLER: They paid the tariffs.

Mr. TEAL: What do you mean by the tariff?

Mr. MILLER: The rate published.

Mr. TEAL: Do you mean the local?

Mr. MILLER: Yes; whatever may be the published rate. It is the only rate we have.

Mr. TEAL: In other words, would a car go to Ashland on a local and then move south on a local, if it was a box car?

Mr. MILLER: It would all depend on where the traffic was going. If it was a through rate, of course it would take the through rate.

Commissioner PROUTY: If you loaded a car north of Ashland with lumber and sent it south with lumber, it would take the \$3.10 rate going to San Francisco?

Mr. MILLER: Yes sir.

Mr. TEAL: Would you allow box cars to be loaded the greater part of last year that way?

Mr. MILLER: For a part of the time our own system cars were not permitted to go south of Ashland, were not permitted to get off the road. That was necessary, to take care of the local traffic,
450 under the demurrage laws as they existed in that state.

Mr. TEAL: That was the answer I wanted to get. I was not criticising you. I simply stated——

Mr. MILLER: Your question put to me was all box cars.

Commissioner PROUTY: Let us not spend time with that now, Mr. Miller. We know the fact that Mr. Teal wants.

Mr. TEAL: Now, on material that was sold by mills in southern Oregon, Mr. Miller. I mean in the Willamette Valley last year. Where ties were sold to the Western Pacific Railroad, loaded on cars of your system, would you allow those cars to go south of Ashland?

Mr. MILLER: Yes; we did not distinguish between any class of traffic, or traffic for any particular parties.

Mr. TEAL: You say that is a fact?

Mr. MILLER: Yes, sir.

Mr. TEAL: And you say then that nothing of that kind happened, where the cars were loaded for the western Pacific, inspected by the inspector, and when he ascertained they were for the Western Pacific, would not allow them to go through Ashland, and they had
451 to be diverted to the Southern Pacific in order to get through.

You say no such thing as that occurred?

Mr. MILLER: I know nothing about any such condition of affairs. I never heard of it before.

Mr. COTTON: Is that at all material, if it existed?

Mr. TEAL: I think it is material.

Mr. COTTON: That might be a discrimination against the Western Pacific, but—

Mr. TEAL: It would be a pretty serious discrimination against the mill men too, I should think.

Mr. COTTON: You have not charged discrimination. I do not want to try here all the collateral questions that may come up, even by insinuation.

Mr. TEAL: Mr. Miller, you stated you have discussed this rate often with the shippers?

Mr. MILLER: Yes, sir; we have talked about it on numerous occasions.

Mr. TEAL: At the time this rate was taken out in the Willamette Valley, was it taken out at the request of anyone or for any other reason than what you have stated?

Mr. MILLER: You are referring now to the advance made from Portland on August 20th, 1903?

452 Mr. TEAL: No, sir; I am referring to the change that was made by the advance in rates in the last tariff.

Mr. DILLARD: In January 1904.

Mr. MILLER: From the Willamette Valley?

Commissioner PROUTY: No; April 18th, 1907.

Mr. TEAL: The question I asked you is this. Was that change made as a result solely of your conclusions that you desired a higher rate there, or was it changed at the request of anyone whose interests were affected by that rate?

Mr. MILLER: It was changed because the rate was too low.

Mr. TEAL: And in talking with these different people that you spoke to, did you ever talk to anybody or in discussing it was it ever suggested to you as a reason for taking it out that the rates as they then existed placed certain people at a disadvantage?

Mr. MILLER: That was suggested to me on many many occasions.

Commissioner PROUTY: What people?

Mr. MILLER: The Portland mill people claimed that a lower rate from points south of Portland was very much against their
453 interests and was unfair to them.

Commissioner PROUTY: That is what they claim here, is it not?

Mr. COTTON: Yes; that is what they claim here.

Mr. TEAL: What I want to know is whether that rate was taken out because of that request or not.

Mr. MILLER: No, sir; that rate was taken out because it was too low. We don't change our rates altogether upon request.

Mr. TEAL: Now Mr. Miller I would like to ask you if you receive or if your road receives any compensatory advantages of any kind by reason of making rates on products such as lumber that can move under it, even though you may think it is a low rate?

Mr. MILLER: Yes, sir.

Mr. TEAL: And that in your opinion justifies those rates does it not?

Mr. MILLER: Justifies what rates, Mr. Teal?

Mr. TEAL: Well, justifies very often a lower rate than you consider compensatory on account of the other business you get.

Mr. MILLER: Yes indeed.

Mr. TEAL: You were speaking about the blanket rates and 454 the rates from the Willamette Valley; I mean northbound.

I would like to ask you whether or not in your opinion if that rate did not exist the same as the Portland rates to eastern points, the lumber could move from the Willamette Valley?

Mr. MILLER: Well, it has always been represented to us that the mills south of Portland could not stand a higher rate to the east than applied from Portland.

Mr. TEAL: But I mean your judgment about it.

Mr. MILLER: My judgment is based entirely upon the information that I have received from the shippers in the Willamette Valley.

Mr. TEAL: What is your judgment?

Mr. MILLER: My judgment is that they cannot pay a higher rate than obtains from Portland into the territory east of—well, to any territory.

Commissioner PROUTY: How do you, as a traffic man, justify the same rate from these Willamette Valley points east via Portland, while you make a higher rate from Portland to San Francisco?

Mr. MILLER: One of the reasons is that prior to the time the rate was established via Portland to the east, the rates were already established via Ashland south.

455 Commissioner PROUTY: So the Portland rate simply took the place of the previous rate?

Mr. MILLER: Yes, sir; except to the territory east of the Missouri River, which was added when the rates were established via Portland.

Commissioner PROUTY: And you divert the traffic by the Portland gate-way now because you can handle it cheaper that way?

Mr. MILLER: Yes sir. Another reason is that the business would not stand the higher rate from the Willamette Valley and Portland, and consequently we would not apply it from that territory.

Commissioner PROUTY: The Portland business, you think is not dependent on the rail rate to San Francisco in the same way that the Willamette Valley business is?

Mr. MILLER: No.

Commissioner PROUTY: And that is to your mind one reason

which might justify taking the rate out at Portland, although it would apply in the Willamette Valley?

Mr. MILLER: Yes, sir.

Mr. TEAL: Mr. Miller, there are just one or two more things I want to ask you about. You have very large oil tanks at
456 Ashland, have you not?

Mr. MILLER: Yes, sir.

Mr. TEAL: That moves by rail, does it?

Mr. MILLER: That oil moves by rail.

Mr. TEAL: Then you have another large oil tank at Roseburg?

Mr. MILLER: Yes, sir.

Mr. TEAL: That goes by rail?

Mr. MILLER: Yes, sir.

Mr. TEAL: It moves pretty well down to the junction, don't you think?

Mr. MILLER: I don't know just how they divide that. Some oil moves south from Portland and some north from San Francisco.

Mr. TEAL: But there is a considerable amount that moves by rail, surely, to the points I have mentioned.

Mr. MILLER: Yes; it all moves by rail to the points you have mentioned, some from Portland and some from San Francisco.

457 Mr. TEAL: Mr. Miller, can you give a statement of the amount of business and the number of trains operated on the Wendling Branch since this cut-off has been put in?

Mr. MILLER: Yes; I think that could be furnished.

Mr. TEAL: I would like to have you do that, if you will—the number of freight trains and the number of passenger trains, and the freight that originates on that branch and ends on that branch.

Mr. MILLER: It depends on how far back the records go, Mr. Teal.

Mr. BOOTH: To show what revenue was derived by that branch on freight other than lumber, is what he wants.

Mr. MILLER: We would not be able to show the revenue of the branch. We could show the tonnage.

Mr. TEAL: The tonnage is all I care for. Mr. Cotton, you asked me yesterday to give you the pages of the report of the Board of Commissioners of Oregon on assessment and taxation, to which I referred, and which was introduced in evidence yesterday. They are
pages 270 to 277, inclusive. They are simply tabulated

458 statements. This report is dated June 30, 1906. I shall not encumber the record, Mr. Commissioner, with the whole report. I will just cut out those pages and send them on, because there are only a few of them.

Redirect examination:

Mr. COTTON: Mr. Miller, you do not make a \$3.10 rate on rough green stuff from Portland, and you have not, have you, for a long time past?

Mr. MILLER: No; we have not, for the last three or four years.

Mr. COTTON: Why not?

Mr. MILLER: The rate is too low and unprofitable. The business is undesirable on that basis.

Mr. COTTON: Could it move in some other way?

Mr. MILLER: It could move by water.

Mr. TEAL: I did not catch the first question.

Mr. COTTON: I thought that was one of the questions you asked.

Commissioner PROUTY: I asked him how he justified taking out the \$3.10 rate to Portland and giving it into the Willamette Valley.

Mr. COTTON: You put in the \$3.10 rate because the stuff
459 could move from Portland?

Mr. MILLER: Yes sir.

Mr. COTTON: Please state whether or not the rates from Portland and the Willamette Valley on lumber to San Francisco were made on a commercial basis with the idea of acquiring revenue out of the rates themselves, or what was the reason why they were made?

Mr. MILLER: Well, they were made for the purpose of developing and encouraging that industry in the Willamette Valley, tributary to the lines of the Southern Pacific Company. There was no money in the business at \$3.10 per ton, directly—no profit in the rate.

Commissioner PROUTY: Was it your idea, Mr. Miller, that the industry can get along without that rate? Is that the theory on which you withdrew it, that it was an infant industry in 1899, and has become old enough to go alone now?

Mr. MILLER: Yes sir.

Commissioner PROUTY: You think this rate is not necessary to that industry at the present time?

Mr. MILLER: No sir.

Commissioner PROUTY: If it were, would you keep it in?
460 Suppose the Commission is of the opinion that it is, ought the Commission to keep it in?

Mr. MILLER: Of course that is a difficult question to answer, not having all of the circumstances and conditions surrounding the business before us. I couldn't answer that question until I knew just what the conditions might be, not only with respect to the lumber traffic itself but with respect to the general conditions existing in that territory.

Mr. COTTON: You do not intend to reduce the lumber business in the Willamette Valley to nothing and prostrate it? You have no idea of destroying it, have you?

Mr. MILLER: Why, decidedly not.

Mr. COTTON: You do regard the present lumber rate, though, that is the \$3.10 rate, as an unreasonably low rate?

Mr. MILLER: Yes sir.

Mr. COTTON: You think it can stand a higher rate?

Mr. MILLER: Yes sir.

Mr. COTTON: And do you regard \$5 as a high rate for the services performed?

Mr. MILLER: I regard \$5 as a low rate for that service,
461 under the circumstances and conditions.

Mr. COTTON: Is that a low rate as compared with other rates, which you are charging on traffic from which you are making your revenue in that territory?

Mr. MILLER: It is very much lower.

Mr. DILLARD: Mr. Commissioner Prouty asked you if you thought the Commission should keep in the rate of \$3.10 if in their judgment they believed it was necessary to the sustaining of the industries. The only question I have is this. Is it not true that the conditions surrounding the operation of that Oregon & California Railway, the river competition at certain places, water competition at other places, and the various conditions are such that it is a road that will have to be handled more specially than almost any other in the fixing of rates by the traffic officers in charge of it?

Mr. MILLER: Yes; I think so. The conditions surrounding the movement of the traffic in that territory are peculiar to themselves, and it is necessary to take into consideration many, many circumstances in determining what rates ought to be or what they might be.

Mr. DILLARD: Has it not been the endeavor, and will it not be, of the traffic officers to derive only a just and proper revenue, and at the same time, so far as can be done, to foster and sustain the industry and keep established reasonable and just rates?

Mr. MILLER: Yes sir; that is the basis upon which we work.

Recross-examination:

Mr. TEAL: Mr. Miller, it is just that difference of opinion, that you made a mistake, that has brought about this proceeding, is it not, and that the experiment will not work in this case? That is our feeling, is it not?

Mr. MILLER: I don't know just what your feeling is, Mr. Teal. I know what your complaint is.

Commissioner PROUTY: Mr. Teal, it is a very important situation in this case as to how far the Southern Pacific may consult its own judgment in these matters and as to how far that judgment can be controlled by the Commission. That is a thing for you gentlemen to argue.

Mr. TEAL: Yes sir; I will argue that at the right time. I think so far as the power is concerned, the Supreme Court of the United States has settled the power of the Commission upon anything of this kind.

Mr. COTTON: We are not quarreling with the power.

Mr. TEAL: It is just a question as to whether—but that is all a matter of argument anyway hereafter. The only thing I have to say is this, your Honor. We have not gone into the question of profits of these gentlemen at all, except as the evidence scintillates throughout the entire case; and to that end I want the privilege of referring to the testimony in the other cases for the purpose of showing what their profit has been.

Commissioner PROUTY: We said you might do that.

Mr. COTTON: That is an important question.

Commissioner PROUTY: Have you any further questions?

Mr. COTTON: No sir; not from Mr. Miller. We would like to put in the local California tariffs too, so as to show the general rate adjustment.

Commissioner PROUTY: Have you any other witness?

Mr. COTTON: No sir.

464 Commissioner PROUTY: Have you any witness you desire to call in rebuttal, Mr. Teal?

Mr. TEAL: No; I would like to have permission to file with the Commission in this case a statement of the profits of the Booth-Kelly Lumber Company since they commenced operations, if that will be of any service.

Commissioner PROUTY: As I said yesterday, Mr. Teal, these two cases have been heard together. You gentlemen are counsel in both cases, and it seems to me you ought to have a right to refer in this case to anything that was developed in the other case.

Mr. TEAL: I did not know it went back that far.

Commissioner PROUTY: I do not see any reason why you should not have that right.

Mr. TEAL: I think it is important, because I think some of these gentlemen are mistaken on some ideas they have, and I want to refer to those matters.

Mr. COTTON: As far as they are in evidence.

Commissioner PROUTY: I think you may have a right to refer, in the argument of this case, to any matter of record in the other case.

465 Mr. TEAL: I ask permission to do this, and I think it is important. I would like to file here, if there is no objection to it, a verified statement of the actual profits of the Booth-Kelly Lumber Company since they started in business in the Willamette Valley

Mr. COTTON: Then I would like to examine Mr. Miles and some of these other gentlemen. That is, if you are going into the question of profits, I want to open up the whole thing.

Commissioner PROUTY: I hardly think we will go into that question.

Mr. COTTON: I do not want to take the profits of one isolated firm.

Mr. TEAL: Very well then; I have no other evidence to introduce.

Commissioner PROUTY: I suppose you desire to argue this case at the same time the other case is argued here?

Mr. TEAL: Yes; but I would like to have a little more time on that brief.

Commissioner PROUTY: We cannot give you more time on that brief if the case is to be argued at that time. The case will stand for argument on the 4th of March. With that understanding,
466 ing, we will take the case under consideration.

The Commission, at 12.40 o'clock p. m., adjourned.

Memorandum Showing Proportion of Through Rates Accruing to Southern Pacific Oregon Lines on Traffic Interchanged with Connecting Lines at Portland, Ore.

All Freight Except Products of the Forest.

Between	and	Southern Pacific Proportion.
All stations on Southern Pacific Oregon Lines.	Points on Oregon Short Line, Union Pacific R. R., Denver & Rio Grande R. R., Colorado Midland Ry. East of Huntington, Ore., to Colorado Common Points including Colo. Com. Points on the Colorado & So. Ry. and Atchison, Topeka & Santa Fe Ry.	Where through rates are established 46½ per cent. subject to local rate as maximum.
	Via O. R. & N. through Huntington, Oregon.	
Do.	All Points East of Colorado Common Points.	Where through rates are established 40 per cent. of through rate or proportion of through rate accruing west of Missouri River or west of Union Pacific or Chicago, Rock Island & Pacific Ry. Junction Points of delivery to connecting lines—subject to local rates as maximum.
	Via O. R. & N. through Huntington, Oregon.	
All points on Main Line Southern Pacific Oregon Lines North of Ashland, Ore.	Points on Northern Pacific Ry., known as Montana Common Points.	45½ per cent. of through rates subject to the local rates as maximum.
	Points on Northern Pacific Ry. east of Helena, Mont., to and including Billings, Mont.	35 per cent. of through rate subject to local rate as maximum.
	Points on Northern Pacific Ry. east of Billings, Mont., to and including Nor. Pac. Ry. Eastern Terminals.	30 per cent. of through rate subject to local rate as maximum.
	Via Portland and Northern Pacific Ry.	

468 *Memorandum Showing Proportion of Through Rates Accruing to Southern Pacific Oregon Lines on Lumber, Shingles, and Products of the Forest, Taking Same Rates, Interchanged with O. R. & N. Co. at Portland and East Portland, Oregon.*

When destined	From	Southern Pacific Proportion.
All stations on Southern Pacific Oregon Lines except Yamhill Division and Mohawk-Wendling Branch.		25 per cent. of through rate or proportion of through rate accruing west of Missouri River Common Points or West of Union Pacific junction points of delivery to connecting lines but not to exceed 10 cents per 100 lbs. except where local rate is less same will govern. (See note.)

Points on Southern Pacific
Yauhhill Division. Arbitrary $7\frac{1}{2}$ cents per 100 lbs.

All points on Oregon Short Line R. R., Union Pacific, also all points on D. & R. G. R. R., and Colo. Midland Ry., except points south of Pueblo, Colo., all Colorado Common Points on Colorado and So. Ry. and A. T. & S. F. Ry.; and all points east of Colorado Common Points to which through rates are established.

Points on Southern Pacific
Molhawk-Wendling Branch.

Through rate is based on arbitrary of $1\frac{1}{4}$ cents per 100 lbs. over rate from Springfield, Oregon, So. Pac. Co. receives this arbitrary plus 25 per cent. of through rate or proportion of through rate accruing west of Missouri River Common Points or west of Union Pacific Junction Points of Delivery to connecting lines, but not to exceed $11\frac{1}{4}$ cents per 100 lbs. (See note.)

Arbitrary of 3 cents for C. & E. Ry. is first deducted and So. Pac. Co. receives 25 per cent. of remainder of through rate or proportion of through rate accruing west of Missouri River Common Points or west of Union Pacific Junction Points of Delivery to connecting lines, but not to exceed local rate of 9 cents per 100 lbs. (See note.)

All points on Corvallis & Eastern Ry. East of Albany to Mill City inc.

Through rate is based on arbitrary of $1\frac{1}{4}$ cents per 100 lbs. over rates from Mill City and C. & E. receives this arbitrary in addition to Mill City revenue, So. Pac. receives same earnings as on traffic originating at Mill City.

All points on Corvallis and Eastern Ry. east of Mill City, Ore.

NOTE.—On shipments destined to Branch Line points or Denver and Rio Grande R. R. west of Grand Junction, Colorado, the Southern Pacific Co. is restricted to its proportion of the Main line rate.

469 *Divisions on Traffic Interchanged with Pacific System Crossing Oregon-California State Line.*

Mileage pro rate, allowing O. & C. R. R. constructive mileage of 25% *i. e.*, on a joint haul of say 300 miles, of which 100 miles was performed by O. & C. R. R., the O. & C. R. R. would receive 125/325 of the through rate.

In addition to above the O. & C. R. R. receives an arbitrary of 40 cents per ton on all freight crossing both the Oregon-California State Line, and Willamette River Bridge at Portland.

470 STATE OF ILLINOIS.

County of Cook, ss:

I, W. B. Scott, being duly sworn on my oath, do say that I am the Assistant Director of Maintenance & Operation for the Southern Pacific Company, and for that part of the lines of said Company extending from Portland to San Francisco, being the Oregon & California Railway, from the Oregon and California State line to Portland, and a part of the Southern Pacific, Pacific System, from the Oregon and California line to San Francisco.

The blue prints hereto attached have been made in my office, and under my direction. They show the profile of the road from Portland to Sacramento. There is little or no grade between Sacramento and San Francisco, and no profile has been made for this part of the road.

Attached to blue print is a statement marked "Exhibit 'A,'" showing the mileage of grades from Portland to San Francisco, the adverse grade and the summit elevation. The maximum grades, in feet per mile, are shown in the blueprint on the grade line. The total rise in grades from Portland to San Francisco and San Francisco to Portland, is indicated in the statement attached to blueprint by showing the number of miles from level to one half per cent., from one half per cent. to one per cent., and thus by half per cents to the greatest maximum of three and three tenths per cent.

What is meant by adverse grade is this: If there were no downgrades from San Francisco to Portland, and the upgrades were all continuous, the total rise would be 10,707 feet. So if there were no downgrades from Portland to San Francisco and all the upgrades were made continuous, the total rise would be 10,684 feet.

As a matter of fact the line passes over the Siskiyou Mountains which rise very abruptly to a height of 4124.8 feet. Referring to the blueprint and the peak marked "Siskiyou" I would state that in going about fifteen miles over the peak you rise 2388.6 feet. At

471 this point the most powerful engine on the S. P. line, an engine of four drivers, and weighing 1715 tons, can only handle 345 gross tons. Ordinarily this includes seven cars and their freight, but under heavy loading, will be only five cars.

Between Grants Pass and West Fork, a distance of 47 miles, there are ordinarily kept five helper engines; between Roseburg and Divide, four helper engines; between Dunsmuir and Ashland, ten helper engines, and between Ashland and Hornbrook two additional helper engines are required. As shown by the exhibit, between Grants Pass and West Fork, a distance of 47 miles, an engine of the type named can handle 560 gross tons; between Roseburg and Divide, 49 miles, 700 gross tons; between Dunsmuir and Ashland, 107 miles, 500 gross tons, and between Ashland and Hornbrook, 36 miles, 345 gross tons.

Helper engines have to be used on 203 miles of the road between Portland and San Francisco. A word of explanation is here necessary as to the statement which would show 239 miles on which a helper engine is used, but on the 36 miles between Ashland and Hornbrook two helper engines have to be used; that is, it takes three engines to handle the train. The helper engines are used downgrade as well as upgrade for the reason that it is necessary to get helper engines to the bottom of the grade in order to help the next train in the opposite direction.

(Signed)

W. B. SCOTT.

Sworn to and subscribed before me, the undersigned, a Notary Public, in and for the State of Illinois, County of Cook, by the said W. B. Scott, this First day of February, 1908. Witness my hand and seal of office.

[SEAL.]

(Signed)

WILLIAM A. RAWSON.

CHARTS

TOO

LARGE

FOR

FILMING

Jan. 28, 1908.

MILEAGE OF GRADES

SAN FRANCISCO TO PORTLAND

146.97 miles level
252.94 " level to $1/2\%$
80.51 " $1/2\%$ to 1%
42.08 " 1% to $1-1/2\%$
18.49 " $1-1/2\%$ to 2%
8.51 " 2% to $2-1/2\%$
5.41 " $2-1/2\%$ to 3%
6.11 " 3% to 3.5%

PORTLAND TO SAN FRANCISCO

146.97 miles level
100.31 " level to $1/2\%$
40.41 " $1/2\%$ to 1%
16.63 " 1% to $1-1/2\%$
31.75 " $1-1/2\%$ to 2%
6.40 " 2% to $2-1/2\%$
4.43 " $2-1/2\%$ to 3%
6.59 " 3% to 3.5%

Total adverse grades San Francisco to Portland.....10,707 ft. rise.

Total adverse grades Portland to San Francisco.....10,684 ft. rise.

Sumit elevation between San Francisco and Portland..... 4,135 ft.

Consolidation Helper Engines used:

5 Between Grants Pass and West Fork;
4 " Roseburg and Divide;
10 " Dummir and Ashland;
2 " Ashland and Hardscrack;

Rolling:

47 miles, 560 tons, 11 loaded cars
40 miles, 700 tons, 14 loaded "
107 miles, 800 tons, 20 loaded "
24 miles, 345 tons, 7 loaded "

(Blue hollows blue print miles p. 473)



EXHIBIT -C-

RATES ON LUMBER FROM SOUTHERN PACIFIC POINTS

TO	From	Date Effective	Via So.Pac.Co. Shasta Line	Rates in effect via ORANCO, from Portland Ore., Huntington Route at time rate via Shas was established.
	PORTLAND, ORE.	2/25/1897	# 40	37-1/2
		# Cancelled May 15, 1901.		
	Main Line pts.			
	On So.Pac.East			
Utah Com.	Side Division	2/25/1897	\$ 40	-----
Points				
	Branch Line Pts.			
	On So.Pac.East			
	Side Division	2/25/1897	\$ 40	-----
	West Side & Yamhill Div.	3/20/1899	\$ 40	-----
		\$ Cancelled October 20, 1902		
	Portland, Ore.	7/3/1894	& 40	40
	Main Line Pts			
	on So.Pac.East			
	Side Div.	7/3/1894	& 40	-----
Colo.				
Com.Pts.	Branch Line			
	Points on So.Pac.			
	East Side Div.	8/15/1900	& 40	-----
	West Side & Yamhill Div.	8/15/1900	& 40	-----
		& Cancelled December 27, 1902.		
	PORTLAND, Ore.	7/15/1901	# \$ 50	50
	Main & Branch			
Pts.on	Line Pts.East			
U.P.in	& West Side			
Neb.& Kan.Divisions		7/15/1901	# \$ 50	-----
		# \$ Cancelled September 26, 1901		
	PORTLAND, Ore.	7/15/1901	# \$ 50	50
	Main & Branch			
Chicago,	Line Pts.East			
Ill.	& West Side			
	Divisions	7/15/1901	\$& 50	-----
		\$& Cancelled July 25, 1901		
		In effect 10 days only.		

Rates via Portland and O R & N Co. established August 24th, 1901.



CLASS RATES-----LOCAL TARIFFS.

Dist- 1001	1	2	3	4	5	A	B	C	D	E
10 OR&N From Portland	10	9	8	7	7	7	6	4	4	3
10 GN East fm Seattle	7.5	7.5	7	6	6	5	5	4	4	3
8 NP East fm Tacoma	14	12	10	8	7	6	5	4	4	3
10 CP Vancouver East	15	13	10	8	7	6.5	6	7	5	5
9 OSL West fm Ogden	10	9	7	6	6	6	5	5	4	3
10 SP South fm Portland	15	13	11	9	8	8	8	6	4	4
11 SPLA from Salt Lake	16	13	11	9	8	8	6	5	4	4
16 SP&N from Spokane	15	13	11	9	8	8	7	5	4	3
6 C&E from Albany	16	14	11	10	8	9	7	7	4	4
11 NBBC Bellingham Wn.	18	16	13	11	9	9	7	5	5	4
10 SPC&W from Dallas Ore.	16	14	11	10	8	9	7	7	4	4
10 SV from Baker City	16	15	14	13	12	11	10	9	8	7
10 GS from Dallas	10	10	10	10	8	8	6	5	5	5
16 RRV from Medford	14	13	12	11	10	2	2	2	1-3/4	1-3/4
10 Pac&Eastern fm Medford	16	14	11	10	9	9	7	7	4	4
10 O&E fm Cottage Grove,	20	20	20	20	12.5	12.5	12.5	12.5	12.5	12.5
10 Spokane Inld Spokane,	14	12	11	10	10	8	7	5	5	4
10 Mt Hood Ry fm Hood River	15	14	13	12	11	11	10	10	9	8
10 OR&N fm Spokane	10	9	8	7	5	5	5	4	4	3
9 NP fm Spokane	10	9	8	7	5	5	5	4	4	3
9 GN from Spokane	10	9	8	7	5	5	5	4	4	3
16 OR&N fm Portland	18	13	12	10	8	10	8	5	5	4
17 GN from Seattle	7.5	7.5	7.5	7.5	7.5	7.5	7.5	7	6	4
18 NP from Tacoma	20	17	14	12	10	8	6	5	4	4
17 CP Vancouver East	22	18	14	11	10	8.5	8	9	8	6
17 OSL West from Ogden	17	15	14	12	10	10	8	7	5	4
20 SP South from Portland	19	15	12	9	8	8	8	6	5	5
17 SPLA from Salt Lake	20	17	14	12	10	10	8	7	5	5
20 SP&N from Spokane	18	15	13	11	9	10	8	6	5	4
17 C&E from Albany	22	19	16	14	12	12	10	8	5	5
20 NBC from Bellingham	20	18	15	13	11	10	9	7	6	4
20 S V from Baker City	28	25	22	20	19	17	13	11	10	9
20 GS from Dallas	16	15	13	12	11	10	9	8	7	6
20 P E from Medford	22	19	16	14	12	12	10	8	5	5
20 O&E from Cottage Grove	25	25	25	25	15	15	15	15	15	15
19 Spokane Inld fm Spokane	14	12	11	10	10	8	7	5	5	4
10 OR&N fm Spokane	14	12	11	10	10	8	7	5	5	4
NP from Spokane	14	12	11	10	10	8	7	5	5	4
22 GN from Spokane	14	12	11	10	10	8	7	5	5	4



1st-
noe.

	1	2	3	4	5	A	B	C	D	E
19 ORAM from Portland	15	13	12	10	8	10	10	8	7	6
20 V from Seattle	7.5	7.5	7.5	7.5	7.5	7.5	7.5	7.5	7	6
26 AP from Tacoma	20	17	14	12	10	8	7	6	5	4
27 CP from Vancouver East	27	23	18	14	13	10.5	9	11	10	7
30 ORL West from Ogden	22	19	17	18	14	13	11	9	8	7
26 S P from Portland	25	19	16	14	12	12	10	9	6	5
27 JPLA from Salt Lake	28	24	20	17	14	14	11	10	7	6
27 JPS from Spokane	27	23	19	16	14	13	13	9	7	6
27 JMS from Albany	27	24	20	17	15	15	13	10	6	6
28 JMS from Bellingham	28	24	20	17	14	14	11	8	7	6
30 S V from Baker City	33	30	27	24	21	18	15	13	11	9
30 S S from Dulles	25	23	20	17	15	14	11	10	9	8
30 P E from Hillsboro	27	24	20	17	15	15	13	10	8	6
30 Spokane Ind from Spokane	20	18	16	15	13	12	9	8	7	6
30 ORAM from Spokane	20	18	16	14	13	12	9	8	7	6
32 HP from Spokane	20	18	16	14	13	12	9	8	7	6
34 O E from Spokane	22	20	18	16	15	14	11	9	8	6

39 ORAM	15	13	12	10	8	12	10	10	9	7
36 G.N.	7.5	7.5	7.5	7.5	7.5	7.5	7.5	7.5	7.5	7
30 H.P.	30	26	22	18	15	12	10	8	6	5
38 C.P.	31	28	22	18	15	12.5	11	12	11.5	8
39 O.S.L.	27	23	22	17	16	15	13	10	9	7
40 S.P.	28	22	19	17	15	15	12	10	7	6
40 S.P.L.A.	37	31	27	22	19	19	15	13	9	7
40 S.V.N.	30	25	22	18	15	17	14	11	8	6
37 C & L	32	28	25	21	19	19	16	11	8	7
40 B B & B C	34	29	24	20	17	17	14	10	9	7
40 S.V.	46	41	36	34	31	28	25	23	22	19
40 T.Z.	32	28	25	21	19	19	16	11	7	7
36 Spokane Int.	22	20	18	16	15	14	11	9	8	7
39 Spokane Ind.	20	18	16	14	13	12	9	8	7	6
40 ORAM from Spokane	22	20	18	16	15	14	11	9	8	7
41 F.P.	22	20	18	16	15	14	11	9	8	7
41 S.S.	22	20	18	16	15	14	11	9	8	7



CLASS RATES-----LOCAL T. & I. P. S.

Disc-	1a	2	3	4	5a	A	B	C	D	E
90 O R & N	40	33	29	24	22	20	18	14	11	8
97 O R	48	41	34	29	24	20	14	14	12	10
97 N.P.	43	36	29	22	20	18	14	15	18	11
92 O.P.	50	43	34	27	23	22	20	18	14	11
25 O.S.L.	52	44	36	31	26	22	17	13	11	10
10 O.P.	52	44	36	31	26	22	17	13	11	10
99 S.P.L.A.	52	44	36	31	26	22	17	13	11	10
90 S.F. & N.	62	53	43	37	31	24	23	22	16	12
78 C & E	45	39	35	32	29	28	24	15	13	10
78 S Int.	38	31	28	24	24	22	18	15	13	10
72 S Inland	34	29	26	22	22	20	16	13	12	10
92 O R & N from Spokane	34	29	26	22	22	20	16	13	12	10
79 N.P. from Spokane	36	31	28	24	24	22	18	15	13	10
78 O N from Spokane	42	36	30	26	26	24	21	18	13	10
90 O R & N	27	22	20	17	12	15	3	12	10	7
90 C E	48	40	35	28	27	24	21	16	13	10
89 N P	54	46	39	34	28	26	22	17	14	11
92 C P	47	39	31	24	22	19, n	15	16, b	16	12, b
100 S L	54	46	36	29	24	23	20	16	12	10
90 C P	50	42	34	27	21	21	19	16	12	10
92 S P L A	52	44	36	31	26	22	17	13	11	10
90 S F & N	60	50	40	32	26	24	20	16	14	11
90 S Int.	40	32	29	25	23	24	20	16	14	11
90 O R & N from Spokane	42	36	31	26	26	24	21	18	13	10
91 N.P.	44	36	31	26	26	24	21	18	13	10
92 O N from Spokane	48	39	33	29	29	29	23	17	15	12
99 O R & N	34	28	25	21	16	16	15	12	10	7
100 O N	55	46	41	34	30	26	23	17	14	12
92 N P	60	51	42	36	30	30	24	18	15	12
96 C P	54	45	36	27	25	21	16	17, b	19, b	14
100 O S L	53	45	36	29	24	23	20	16	12	10
97 S P	35	32	29	27	25	25	21	17	13	11
92 S P L A	60	51	42	36	30	30	24	18	15	12
101 S F & N	76	65	53	46	38	43	34	27	19	15
96 S Int.	44	36	31	26	26	24	21	18	13	10
101 O R & N from Spokane	47	39	34	30	30	30	25	19	14	12
101 N P from Spokane	48	39	33	29	29	29	23	19	16	12
97 O N from Spokane	50	42	36	30	30	30	24	18	15	12

CLASS--RATES--LOCAL TARIFFS.

Dist- ance.	1	2	3	4	5	A	B	C	D	E
110 O R & N	45	38	32	27	23	22	18	14	11	9
109 G N	65	52	45	39	33	29	25	19	16	13
107 H P	64	54	45	37	32	28	24	19	16	13
109 C.P.	60	50	40	30	27	22	17	13	10	8
111 C S L.	55	46	37	32	26	27	24	18	14	11
110 S P	40	37	33	30	28	26	23	19	14	11
109 S P L.A.	54	54	45	38	32	32	26	21	16	13
110 S P & N.	73	65	55	47	39	43	36	27	20	16
110 Spokane Int.	42	42	34	30	30	30	26	19	16	13
108 O R & N from Spokane	47	39	34	30	30	30	26	19	16	13
3 WP from Spokane	10	42	36	30	30	30	26	20	17	13
107 O N from Spokane	16	48	39	33	32	32	26	19	16	13



CLASS RATES---LOCAL TARIFFS.

Dis- tance.		1	2	3	4	5	A	B	C	D	E
117 OR & N		51	43	36	31	24	24	21	16	13	11
117 GN		60	56	47	41	35	32	27	20	17	14
120 NP		68	58	48	41	34	34	27	20	17	14
114 CP		60	50	40	30	27	22	17	19	22	15
116 OS L		55	46	37	34	31	28	24	24	19	15
118 SP		45	41	36	34	32	30	24	19	14	12
118 S P L A		68	58	48	41	34	34	27	24	17	14
120 S P & N		80	68	56	48	40	44	36	28	20	16
119 S Int.		60	51	42	36	34	34	27	20	17	14
119 OR&N from Spokane		65	57	48	41	34	34	27	20	17	13
120 NP " "		58	49	41	35	30	30	27	20	17	13
122 ON " "		64	52	43	35	35	34	28	21	18	14
126 OR & N		59	49	41	35	27	27	24	18	15	12
124 HN		71	58	49	42	35	35	28	21	17	14
125 NP		70	60	49	42	35	35	28	21	18	14
123 CP		66	55	44	33	30	24	19	20	24	16
128 OS L		55	46	37	35	32	28	24	24	19	16
130 SP		48	44	41	37	34	32	26	20	15	12
123 S P L A		70	60	49	42	35	35	28	25	18	14
129 S Int.		80	70	57	49	41	45	37	29	21	16
132 OR&N from Spokane		74	63	52	44	37	35	30	22	17	13
133 NP " "		62	53	43	37	30	30	29	22	17	13
132 GN " "		66	54	45	36	35	34	30	22	19	14
141 OR & N		65	55	46	39	31	31	26	20	16	13
142 ON		78	64	54	45	39	35	30	23	19	14
140 NP		76	65	53	46	38	38	30	23	19	15
140 CP		72	60	48	36	32	26	20	22	26	16-1/2
142 OS L		65	54	45	37	32	31	30	27	22	16
140 SP		52	47	43	40	36	34	27	21	16	13
139 S P L A		76	65	53	46	38	38	30	27	19	15
140 S P & N		84	71	59	50	42	46	38	29	21	17
141 S Int.		64	55	44	38	38	38	31	23	19	15
138 OR&N from Spokane		76	65	53	46	38	38	30	23	17	13
141 NP " "		72	62	51	44	35	35	31	23	20	15
138 GN " "		68	55	45	37	35	35	30	23	19	15



CLASS RATES --- LOCAL TARIFFS.

Dist- ance.	1	2	3	4	5	A	B	C	D	E
150 O R & N	70	60	50	45	33	33	28	21	18	14
146 O N	80	66	56	46	40	36	31	23	19	15
145 N P	78	66	56	47	39	39	31	23	20	15
147 C P	76	64	51	45	34	28	21	23	28	17-1/2
150 O S L	70	56	47	40	35	34	33	29	23	17
149 S P	56	50	46	42	39	36	29	22	16	13
153 S P L A	82	72	57	49	41	41	33	29	21	16
150 S P & N	84	71	59	50	42	46	38	29	21	17
161 O R & N	75	63	53	45	35	35	30	23	19	15
165 O N	85	70	60	50	43	39	34	25	20	15
161 N P	86	73	60	52	43	43	34	26	20	16
161 C P	78	66	52	39	35	29	22	23.5	29	18
160 O S L	70	56	47	40	35	34	33	29	23	17
160 S P	58	52	49	45	41	38	30	22	17	14
168 S P L A	84	74	59	50	42	42	34	29	21	17
169 S P & N	84	71	59	50	42	46	38	29	21	17
170 O R & N	75	65	55	47	37	37	32	24	20	16
172 O N	85	70	60	50	44	39	34	25	20	15
168 N P	88	75	62	53	44	44	35	26	22	16
166 S P	80	67	54	40	36	30	22	24	30	18-1/2
170 O S L	70	60	50	43	35	35	34	31	24	17
167 S P	61	55	51	47	43	39	31	23	17	14
169 S P L A	86	75	62	53	44	44	36	31	23	16
171 S P & N	84	71	59	50	42	46	38	29	21	17
179 O R & N	83	69	58	50	39	39	33	25	21	17
177 O N	85	70	60	50	44	39	34	25	20	15
180 N P	92	75	64	55	46	46	37	27	23	17
178 C P	86	72	57	43	38	32	23	25	32	19-1/2
174 O S L	70	66	57	50	40	39	38	33	27	20
181 S P	67	59	55	50	46	42	34	24	18	15
179 S P L A	92	83	64	55	46	46	37	32	23	18
180 S P & N	84	71	59	50	42	46	38	29	21	17



CLASS RATES --- LOCAL TARIFFS.

Dist- no.	1	2	3	4	5	A	B	C	D	E
193 O R & N	89	74	62	53	42	42	36	27	22	18
190 G N	92	78	64	54	47	42	37	28	22	16
190 N P	96	81	67	58	46	46	38	27	23	17
190 C P	90	75	60	45	40	33.5	25	26	33.5	20-1/2
193 O S I	70	66	57	50	40	39	38	34	27	20
193 S P	70	62	57	53	48	44	36	24	18	18
189 S P L A	96	84	67	58	48	48	38	34	24	19
190 S P & N	84	71	59	50	42	46	38	29	21	17
201 O R & N	91	76	64	55	43	43	36	27	23	18
201 G N	96	82	67	57	49	44	39	29	22	16
200 N P	97	81	68	58	46	46	39	28	24	18
196 C P	92	77	61	46	41	34.5	25	26.5	34.5	20.5
200 O S I	90	80	67	60	45	43	42	36	28	21
198 S P	72	64	59	55	50	45	36	25	18	15
199 S P L A	100	88	70	60	50	50	40	35	25	20
400 S P & N	84	71	59	50	42	46	38	29	21	17
230 O R & N	99	83	69	59	47	47	40	30	25	20
217 G N	101	86	73	63	53	48	43	32	24	17
221 N P	97	81	68	58	46	46	39	29	24	19
219 C P	99	88	65	49	44	36.5	27	28	36.5	22
216 O S I	91	81	68	61	48	44	43	38	30	21
220 S P	80	70	65	60	55	50	39	26	20	17
217 S P L A	108	92	76	65	54	54	43	38	27	22
236 O R & N	105	88	74	63	50	50	42	32	26	21
280 G N	107	93	79	69	57	52	46	35	26	19
238 N P	97	81	68	58	46	46	39	29	24	19
236 C P	105	88	76	63	47	39.5	29	29.5	39.5	23.5
234 O S I	92	82	69	62	49	44	43	40	31	22
239 S P	86	76	70	65	59	53	42	27	20	17
438 S P L A	114	97	80	69	57	57	46	41	28	23
263 O R & N	115	97	81	68	55	55	46	35	29	23
263 G N	114	98	86	74	59	56	50	38	28	21
262 N P	114	100	83	71	57	55	47	35	26	20
259 C P	111	93	74	56	50	42	31	31	42	25
258 O S I	99	88	78	65	55	47	43	43	33	24
259 S P	94	82	76	70	63	58	46	29	22	19
257 S P L A	124	105	87	74	62	62	50	43	31	25

CLASS RATES --- LOCAL TARIFFS

Dis- tance.		1	2	3	4	5	A	B	C	D	E
280 O R & N	123	103	86	74	59	59	49	37	31	25	
279 G N	118	103	89	75	60	59	51	40	30	22	
278 N P	116	105	88	75	60	55	47	36	26	20	
278 C P	117	98	78	59	53	44.5	32	32.5	44.5	26	
278 O S L	105	95	80	70	58	55	49	45	35	25	
260 S P	101	88	62	77	68	62	49	30	22	19	
278 S P L A	132	112	92	79	66	66	53	46	33	26	
297 O R & N	129	108	90	77	62	60	52	39	32	26	
296 G N	123	109	94	77	62	62	52	42	32	23	
298 N P	120	108	89	79	65	55	48	37	27	20	
300 C P	123	103	82	62	56	47	33	34	47	27-1/2	
305 O S L	112	99	85	72	60	57	55	47	37	27	
297 S P	107	93	86	80	72	65	51	31	23	20	
299 S P L A	140	120	99	85	71	71	56	49	35	28	
317 O R & N	135	115	95	80	65	60	53	43	33	26	
314 G N	129	114	95	78	63	63	53	43	34	24	
314 N P	123	110	90	80	65	56	49	38	28	21	
316 C P	129	100	86	65	59	49.5	35	35.5	49.5	29	
314 O S L	114	99	87	72	60	58	55	47	37	27	
320 S P	115	100	92	86	77	70	55	33	25	22	
319 S P L A	150	132	109	95	79	75	60	53	39	32	
336 O R & N	135	120	95	80	65	60	55	44	35	26	
336 G N	135	120	95	80	65	61	55	44	36	26	
339 N P	127	112	90	80	65	59	51	40	30	21	
338 C P	135	113	90	68	61	51.5	37	36.5	51.5	30	
335 O S L	120	105	89	73	60	58	57	48	38	28	
341 S P	125	107	99	91	82	74	58	34	26	23	
338 S P L A	160	144	119	105	87	79	63	56	43	36	

CLASS RATES --- LOCAL TARIFFS

Distance	1	2	3	4	5	A	B	C	D	E
356 O R & N	135	120	95	80	65	60	55	46	36	26
356 G N	138	120	97	83	68	68	55	47	36	27
360 N P	135	120	94	80	65	62	52	42	32	23
359 C P	143	119	95	72	65	55	38	38	55	32
357 O S L	123	108	92	76	62	80	58	49	39	29
358 S P	129	112	105	95	86	78	61	35	26	23
358 S P I. A	171	157	130	113	95	83	66	59	47	40
376 O R & N	140	130	95	82	67	65	55	46	36	26
376 G N	142	121	99	85	71	71	57	48	36	28
379 N P	135	120	95	80	65	64	54	44	35	25
380 C P	148	124	99	74	67	57	39	39	57	33
379 O S L	125	110	95	85	75	75	62	50	40	30
379 S P I. A	181	170	140	123	103	87	69	62	51	44
400 O R & N	140	130	95	82	67	65	55	46	36	26
401 G N	147	125	103	88	74	74	59	49	37	29
400 N P	135	120	95	80	65	65	55	44	36	26
399 C P	158	132	105	79	71	60.5	42	41	58.5	35.5
403 O S L	138	125	111	100	81	76	64	54	42	34
398 S P I. A	194	183	151	133	111	91	72	64	55	47



TABLE 83.—Showing the Comparative Price of Lumber for the Past Seven Years, as Shown by the Records of the Booth-Kelly Lumber Co.

Customer.	Order.	Date.	Year.	Ties.	Timbers.	String.	Ro. fram.	Ro. sills, 36 to 40.
P. Co. C. & N. W.	32030 P-07278	11/6-'06 8/6-'07	1907	Sls. 13.50	13.50	16.50	21.00	23.00
P. Co. C. & N. W.	12544 P-11165	5/17-'06 11/3-'05	1906	Sls. 9.45	8.50	9.50	18.00	21.00
P. Co. C. & N. W.	H-453 P-02961 H-193	5/29-'05 3/31-'05 3/11-'05	1905	Sls. 8.50	7.25	7.75	15.00	16.00
P. Co. C. & N. W.	H-267 H-419 H-301 H-467	5/2-'04 7/25-'04 5/19-'04 8/25-'04	1904	Ro. 8.50	8.00	8.50	15.00	15.00
P. Co. C. & N. W.	H-576 P-46238	4/24-'03 12/5-'02	1903	Sls. 9.70	8.50	9.50	16.00	16.00
P. Co. C. & N. W.	H-1810 H-831 P-32216	12/30-'02 6/17-'02 3/28-'02	1902	Sls. 8.00	8.00	10.00	14.00	15.00
P. Co. C. & N. W.	E/L1804 H-860 H-853 H-278	7/1-'01 8/23-'01 8/23-'01 3/20-'01	1901	Ro. 7.00	7.50	8.50	12.00	12.00

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ANDERSON EX. See p. 42.

History of Rate on Lumber from Various Points on Southern Pacific Company's Lines in Oregon to Various Points in California.

The rate is what is known as the 3.10 rate and 3.10 rate scale or basis.

The 3.10 rate proper applied to San Francisco, Oakland and a few other points designated as San Francisco Bay Points.

The 3.10 scale applied to various points just beyond the Bay points, the rates to which were based on the 3.10 rate plus local rate from San Francisco back, within a radius of what would be less than \$5.00 when the local was added to the \$3.10.

The Tariffs in which rate is found are as follows:

Southern Pacific Company,

Lumber Tariff No. 2, I. C. C. #1301;

Southern Pacific Company,

Lumber Special No. 1, I. C. C. #1671;

Southern Pacific Company,

Interstate Commodity Rate #7, I. C. C. #2268;

Southern Pacific Company,

Local Freight Tariff #47, I. C. C. #2874.

This rate first made its appearance in Amendment #4 to Southern Pacific Company Lumber Tariff No. 2, I. C. C. 1301 Feb. 20, 1899, and applied as a 3.10 scale on Lumber of all kinds, from Portland, East Portland, Saginaw, Coburg and Albany only.

In amendment 13 effective April 22, 1899, the 3.10 rate proper was put in from foregoing points to San Francisco, Oakland and a few other Bay points.

487 Amendment 14 effective April 20, 1899, made the scale applicable from Dallas on the Yamhill Division.

In August, 1899, under Amendment 29 both the rate proper and the scale were made to apply from Portland, Jefferson Street.

On January 1, 1900, South Pacific Co. Lumber Tariff #2, I. C. C. #1301, a flat rate of 3.10 per ton was installed from

Portland, Oregon. } 162 miles.
Drain, Oregon. }

and points between these two; also Woodburn, Springfield Branch, to

San Francisco and a few Bay Points.

\$3.50 to Stockton, Sacto, San Jose and Santa Clara.

\$4.10 to Elmira and Vacaville.

\$4.60 to Winters.

The \$3.10 flat rate and these others comprise what is termed the \$3.10 scale.

At the same time this scale was also made effective from Portland (Jefferson St.) and all points on West Side and Yamhill Divisions of South Pacific Company's Lines. These rates were just 25c in excess of rates from Portland—Drain, viz:

\$3.35 to San Francisco Bay Points.

\$3.75 to Stockton, etc.

\$4.35 to Elmira and Vacaville.

\$4.85 to Winters.

At this time the rate applied on Lumber only; but on October 25, 1900, it was modified so as to include Lath and Fence Posts.

488 On August 15, 1902, forwarding territory extended 101 miles beyond Drain to Glendale.

On June 16, 1902, forwarding territory was extended to Lebanon on Lebanon Branch and application was definitely limited to fir and other soft lumber.

Several additional receiving points were also added.

On August 20, 1903, rate from

Portland to Glendale,

East Portland,

Portland, Jefferson St.,

was cancelled and *raised* to \$5.00.

On August 20, 1903, \$3.10 scale was made to extend from Salem to Glendale and points between these two,

Woodburn, Springfield Branch,

And Lebanon Branch.

On this date also application was limited to Green Lumber.

On November 1, 1903, Amendment 89 to I. C. C. 1671 raised the rate from Portland, East Portland and Portland, Jefferson St., to \$7.50 per ton, but it was reduced to \$5.00 per ton basis on December 7, 1903, by amendment 92 to I. C. C. #1671 since which time it has not been changed.

On December 7, 1903, forwarding points were further modified by limiting Woodburn, Springfield Branch, to points South of Tallman and main line territory to points Albany to Glendale.

On January 1, 1904, rate from all points in Oregon was raised to \$5.00 per ton.

489 On May 10, 1904, in Amendment 117 to I. C. C. 1671, the \$3.10 scale reinstated substantially as follows:

From

Portland,

East Portland,

California-Oregon State Line and points between.

Woodburn-Springfield Branch, Tallman and South,

Lebanon Branch,

To

Points other than San Francisco and others designated as Bay Points,

Rate of

\$3.55 to \$4.90 per ton.

From

Portland (Jefferson St.),

All points on West Side and

Yamhill Divisions, including

Sheridan Branch.

To

Points other than San Francisco and others designated as Bay Points,

Rate of

\$3.80 to \$4.95 per ton.

From

Salem to California-Oregon State Line and points between, Woodburn, Springfield Branch, Tallman and South and Lebanon Branch,

To

San Francisco and other designated as Bay Points flat rate of \$3.10 per ton

490

From

Airline,

Tualatin and points between, including Sheridan Branch on Yamhill Division, Corvallis,

Beaverton and points between on West Side Division, rate of \$3.35 per ton.

On April 18, 1907, above rates to all points were superseded by \$5.00 rate, as per Southern Pacific Co. Local Freight Tariff # 47, I. C. C. # 2874, which is in effect now.

EXHIBIT -D-

STAPLE COMMODITY RATES

	Sugar	Can'd Goods	Salt	Rice	Beans	Dried Fruit
San Francisco to Portland, Rail	15-1/2	18	15-1/2	25	10	18
San Francisco to Eugene, Rail	45-1/2	40	30	50	40	51
Portland to Eugene	33	33	20	35	33	36

CLASS RATES

	1	2	3	4	5	A	B	C	D	E
San Francisco to Portland, Rail	51	41	41	41	26	28	28	28	28	28
San Francisco to Eugene, Rail	91	77	74	71	58	56	50	45	40	37
Portland to Eugene	46	42	39	36	33	31	25	20	15	12

All Rail Rates from San Francisco to Eugene and other points South of Portland are based on the rates by rail San Francisco to Portland, plus the local rates Portland to destination, less 6 cents per 100-lbs. L.C.L., and 3 cents per 100-lbs. C.L.

This deduction is made in order to more equalize via all rail, the combination of the water and rail rates.

Rates by Rail San Francisco to Portland are, generally speaking, 6 cents L.C.L. and 3 cents C.L. higher than the rates by Water.

SACRAMENTO DIVISION

STATEMENT OF

FREIGHT TRAINS IN AND OUT OF ASHLAND & NUMBER OF ENGINES & CARS IN EACH
TRAIN DURING FIRST 7 DAYS OF FEBRUARY, JUNE & NOVEMBER.

1907.

SOUTH BOUND					NORTH BOUND				
Date	Train	Engines	Loads	Mtys.	Date	Train	Engs.	Loads	Mtys.
Feb. 1	Ex.	3	18	6	Feb. 1	226	1	4	
	225	1	6	1		222	2	18	8
						Ex.	2	12	
2	Ex.	1	9	4	2	226	1	3	2
	221	3	20	4		Ex.	2	11	8
						Ex.	2	19	4
3	Ex.	3	21	3	3	222	2	19	
	225	2	11			226	1	5	6
	221	3	21			Ex.	2	21	
4	Ex.	3	21		4	222	3	21	3
	225	1	9			226	1	7	4
	Ex.	3	20			Ex.	2	3	27
	Ex.	3	18	7					
5	225	1	5		5	Ex	3	25	
	221	3	20	1		222	2	15	
						Ex	2	20	
						226	1	6	
						Ex	2	16	4
6	Ex	3	22	2	6	226	1	6	
	Ex	2	10	1		Ex	2	11	6
	225	1	4			Ex	2	6	14
	Ex	3	22						
	221	3	18	4					
7	225	1	6		7	222	2	17	
	221	3	23			226	1	6	5
	Ex	3	20	3		Ex	2		30
	Ex	3	22	3					
Total	22	52	346	39		23	41	273	121
June 1	225	2	13	2	June 1	Ex	3	32	
	Ex	3	22	2		Ex	2	27	
	Ex	3	24	1		Ex	3	23	12
	Ex	3	21	3		Ex	2		13
						Ex	1	1	16
2	225	2	12		2	222	3	32	
	Ex	2	14	2		Ex	3	31	
	Ex	3	24	2		Ex	1		18
3	225	2	12		3	226	1	7	2
	Ex	3	24	1		Ex	2	16	11
						Ex	3	23	3
						Ex	1	1	17
4	225	2	12		4	222	2	15	
	Ex	3	25	2		Ex	3	32	1
	Ex	3	21	9					
5	225	2	12		5	222	2	4	26
	221	3	27			Ex	3	23	12
	Ex	3	20	4		Ex	3	27	
						Ex	2		20
6	Ex	3	23		6	Ex	3	33	
	225	3	12			Ex	3	18	17
	Ex	3	23	3		Ex	3		35
7	225	1	7		7	222	3	16	13
	Ex	3	24	2		Ex	2	6	16
	Ex	3	22	3		Ex	3	28	1
Total	22	58	412	42		24	57	56	233

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SOUTH BOUNDNORTH BOUND

Date	Train	Engines	Loads	Mtys.	Date	Train	Engs	Loads	Mtys.
Nov. 1	Ex	2	16	6	Nov. 1	Ex	3	22	2
	226	1	8	9		225	2	13	
	222	2	4	28		Ex	2	8	
						Ex	3	25	1
						Ex	3	24	
2	Ex	1	12		2	225	2	17	
	Ex	3	24	6		Ex	1	11	
	Ex	2	15	2		Ex	3	22	4
	222	2	13	18					
3	222	3	19		3	Ex	3	21	2
	Ex	1	10			Ex	3	24	
	Ex	1	5	4		225	2	10	
						Ex	3	23	1
4	Ex	1	8		4	225	2	11	2
	Ex	1	10			Ex	3	22	2
	222	2	20	1		Ex	3	28	1
5	Ex	2	20		5	225	1	6	
	Ex	3	18			Ex	3	28	
	Ex	3	10	9					
	222	3	26						
6	Ex	2	7	2	6	Ex	3	23	
	222	3	21			225	2	12	
						Ex	3	26	1
						Ex	3	24	
7	Ex	3	19	1	7	225	2	13	
	Ex	2	14			Ex	3	25	
	Ex	1	6			Ex	3	21	
	222	3	19	6					
TOTAL	23	47	324	92		24	61	449	16

1905

NORTH BOUNDSOUTH BOUND

Feb. 1	Ex	3	17	13	Feb. 1	225	3	10	1
	226	3	7	23		Ex	3	17	3
	222	3	16	19		221	3	20	2
2	226	1	6	14	2	225	2	3	3
	222(1)	3	15	14		221	3	18	4
	222(2)	2	7	19					
3	226	2	4	17	3	225	2	9	
	222(1)	2	5	7		Ex	3	19	
	222(2)	2	18			Ex	3	16	
4	226	2	6	2	4	221	3	20	1
	222(1)	2	6	15		225	2	7	5
	222(2)	2	18	4		Ex	3	18	2
5	226	2	5	21	5	221	3	18	5
	Ex	3	22	4		225	2	7	9
	222	3	20	6		Ex	3	5	18
6	222	3	24		6	225	2	10	1
	226	1	4			Ex	3	14	5
	Ex	2	5	1					
7	Ex	3	16	3	7	Ex	3	3	17
	226	1	4	1		225	2		10
	222	3	14	14		Ex	3		22
TOTAL	21	48	239	197		19	51	212	108

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POOR CO

NORTH BOUNDSOUTH BOUND

	<u>Train</u>	<u>Engines</u>	<u>Loads</u>	<u>Mtys.</u>	<u>Date</u>	<u>Train</u>	<u>Engs</u>	<u>Loads</u>	<u>Mtys</u>
1	226	2	7		June 1	1 225	2	5	2
	Ex	3	24		1	221	3	24	1
2	221	2	18		2	225	1	6	
	226	1	2	8		221	3	25	
	Ex	2	19	1					
3	226	2	6	26	3	225	1	6	1
	Ex	3	28			221	3	25	1
4	222	2	7	22	4	225	2	10	2
	226	2	26			221	3	22	2
	Ex	2	19						
5	222	3	24	11	5	225	2	9	
	226	1	1	3		221	3	22	2
	Ex	3	14						
6	226	1	4	6	6	225	1	2	2
	Ex	3	28			Ex	3	17	15
	Ex	1	9	1					
7	226	1	3	1	7	225	3	14	1
	Ex	3	20	6		221	3	23	
	Ex	2	4	12					
AL	19	39	239	124		14	33	210	29
1	Ex	2	8	9	Nov. 1	225	2	11	
	222	3	15	11		221	2	21	
	226	1	2	2		Ex	3	20	
						Ex	3	19	
2	222	3	27	1	2	225	2	10	1
	226	1	2	2		221	3	16	2
	Ex	2	9			Ex	3	25	
	Ex	2	4	26					
3	226	1	1	4	3	225	2	10	1
	Ex	1	4	6		221	3	25	
						Ex	3	19	1
4	Ex	3	19	3	4	225	2	9	3
	226	1	3	3		221	3	26	
	Ex	3	23			Ex	2	15	
	Ex	3	23			Ex	3	19	
5	226	1	6	2	5	225	2	10	2
	Ex	1	25	1		221	3	24	
	Ex	1	5	1		Ex	3	21	
6	226	1	3	6	6	225	2	9	1
	Ex	2	18	1		221	3	22	
						Ex	3	20	
7	222	3	27		7	225	2	10	1
	226	1	6			221	3	21	
	Ex	3	7			Ex	3	22	
AL	21	39	237	78		23	60	404	12



FEBRUARY 1905 WEST

INTO ASHLAND FROM NORTH

DATE	TRAIN	NO OF ENGINES	LOAD	EMPTY
Feb. 1	221	1	29	
	225	1	11	
	Ex. West	1	12	
2	221	1	13	2
	225	1	24	
3	221	1	26	1
	225	1	19	
4	221	1	16	
	225	1	13	8
	Ex. West	1	12	1
	Ex. West	1	14	
5	221	1	8	
	225	1	7	
	Ex. West	1	11	1
	Ex. West	1	9	5
6	221	1	16	
	225	1	16	
	Ex. West	1	13	
7	221	1	13	3
	225	1	13	
	Ex. West	1	14	1
	Ex. West	1	14	
Total	21 Trains	21	308	22

FEBRUARY 1905 EAST

OUT OF ASHLAND TO NORTH

Feb. 1	222	1	17	27
	226	1	4	15
2	226	1	5	27
	Ex. East	1	13	19
3	226	1	8	1
	Ex. East	1	4	19
	Ex. East	1	12	22
4	226	1	3	35
	Ex. East	1	19	
5	222	1	21	19
	226	1	4	22
	Ex. East	1	20	5
6	222	1	20	6
	226	1	5	20
	Ex. East	1	6	5
7	222	1	24	
	226	1	3	1
	Ex. East	1	15	3
	Ex. East	1	15	
18 Trains		18	300	246



JUNE 1905 WEST

INTO ASHLAND FROM NORTH

DATE	TRAIN	NO OF ENGINES	LOAD	EMPTIES
June 1	221	1	14	
	225	1	10	
	Ex. West	1	13	
2	221	1	16	
	225	1	11	
3	221	1	16	
	225	1	13	
	Ex. West	1	15	1
	Ex. West	1	12	
4	221	1	13	
	225	1	11	1
5	221	1	13	
	225	1	13	
	Ex. West	1	12	1
6	221	1	17	
	225	1	15	
	Ex. West	1	13	
7	221	1	14	
	225	1	14	
	Ex. West	1	27	1
Total	20 Trains	20	252	5

JUNE 1905 EAST

OUT OF ASHLAND TO NORTH

June 1	226	1	7	
	Ex. East	1	35	
	Ex. East	1	1	21
	Ex. East	1	8	12
2	226	1	3	
	Ex. East	1	18	3
3	226	1	1	9
	Ex. East	1	19	1
4	226	1	5	
	Ex. East	1	28	26
	Ex. East	1	5	
	Ex. East	1	5	23
5	226	1	3	
	Ex. East	1	18	26
	Ex. East	1	33	
6	226	1	6	
	Ex. East	1	26	16
7	226	1	1	
	Ex. East	1	14	6
Total	19 Trains	19	229	145



NOVEMBER 1905 WEST

INTO ASHLAND FROM NORTH

DATE	TRAIN	NO OF ENGINES	LOAD	EMPTY
Nov. 1	221	1	12	
	225	1	8	
	Ex. West	1	10	
2	221	1	26	
	225	1	12	
	Ex. West	1	17	
	Ex. West	1	24	
3	221	1	14	
	225	1	15	
	Ex. West	1	12	
	Ex. West	1	14	
4		1	16	
	225	1	9	
	Ex. West	1	13	
	Ex. West	1	15	
5	221	1	14	
	225	1	10	
	Ex. West	1	9	
	Ex. West	1	9	
	Ex. West	1	10	
6	221	1	13	
	225	1	10	
	Ex. West	1	17	
	Ex. West	1	14	
7	221	1	17	1
	225	1	11	
	Ex. West	1	12	
	Ex. West	1	15	
Total	28 Trains	28	378	2

NOVEMBER 1905 EAST

T OF ASHLAND TO NORTH

Nov. 1	222	1	14	11
	226	1	3	
	Ex. East	1	8	11
	Ex. East	1		Cab
2	222	1	23	
	226	1	3	
	Ex. East	1		Cab
	Ex. East	1		Cab
3	222	1		8
	226	1	6	4
	Ex. East	1	7	23
	Ex. East	1		Cab
4	222	1	17	
	226	1	7	6
	Ex. East	1		Cab
	Ex. East	1	18	3
5	Ex. East	1	2	6
	222	1	23	
	226	1	6	1
	Ex. East	1	20	
6	Ex. East	1	6	1
	222	1	18	1
	226	1	5	
	Ex. East	1	5	1
7	Ex. East	1		Cab
	222	1	26	
	226	1	3	6
	Ex. East	1		Cab
Total	29 Trains	29	236	89



EXHIBIT -A- Page 4.

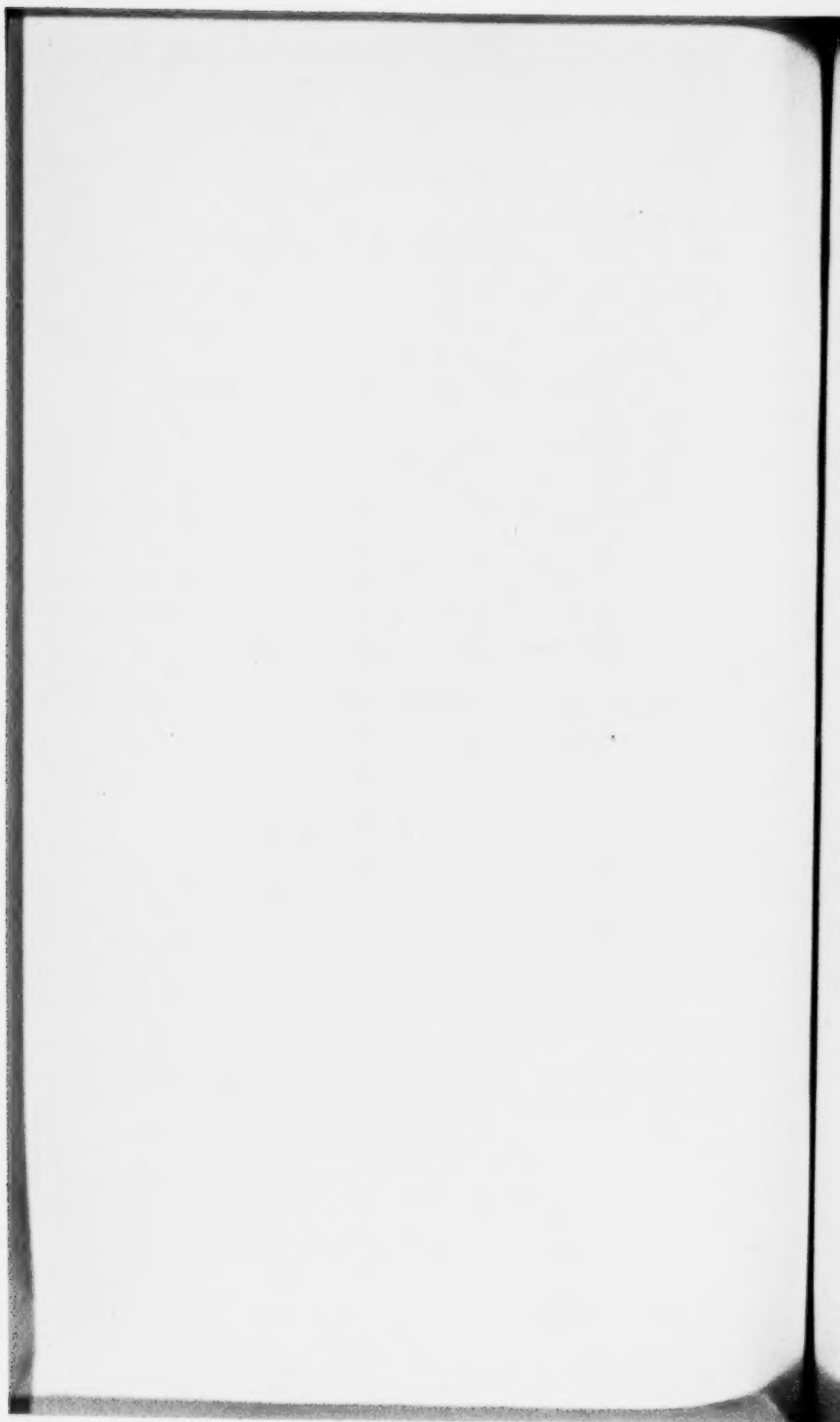
FEBRUARY 1907 WEST

INTO ASHLAND FROM NORTH

DATE	TRAIN	NO OF ENGINE	LOAD	REPTIES
Feb. 1	221	1	25	
	225	1	9	
2	Ex. West	1	27	1
3	221	1	22	7
	225	1	17	
	Ex. West	1	20	
4	221	1	22	4
	Ex. West	1	23	1
	225	1	8	
5	221	1	25	
	225	1	8	
	Ex. West	1	23	1
6	221	1	24	4
	225	1	11	1
	Ex. West	1	25	3
7	221	1	22	5
	225	1	10	
	Ex. West	1	23	3
Total	18	18	342	30

OUT OF ASHLAND TO NORTH FEBRUARY 1907 EAST

Feb. 1	Ex. East	1	17	6
2	226	1	6	14
	Ex. East	1	34	4
3	222	1	35	5
	Ex. East	1	13	10
4	222	1	20	1
	226	1	7	7
	Ex. East	1	9	31
5	222	1	23	
	226	1	8	2
	Ex. East	1	39	
6	226	1	8	1
	Ex. East	1	19	6
7	222	1	1	
	226	1	6	14
	Ex. East	1	17	6
Total	17 Trains	17	260	107



JUNE 1907 WEST

Y O ASHLAND FROM NORTH

DATE	TRAIN	NO OF ENGINE	LOAD	EMPTIES
June 1	221	1	17	11
	225	1	11	1
	Ex. West	1	22	3
2	221	1	21	1
	225	1	13	
	Ex. West	1	24	3
	Ex. West	1	24	
3	221	1	20	9
	225	1	3	Cab
	Ex. West	1		Cab
	Ex. West	1	26	
4	225	1	8	Cab
	Ex. West	1		Cab
	Ex. West	1	24	6
	Ex. West	1		Cab
5	221	1	25	3
	225	1	4	
	Ex. West	1	3	
6	221	1	24	3
	225	1	13	
	Ex. West	1	22	
7	221	1	31	1
	225	1	10	2
	Ex. West	1	2	
Total	24 Trains	24	349	43

JUNE 1907 EAST

Y O ASHLAND TO NORTH

June 1	226	1	6	2
	Ex. East	1	32	1
2	222	1	30	
	226	1	4	3
	Ex. East	1	28	14
	Ex. East	1	21	23
3	226	1	4	
	Ex. East	1	33	32
	Ex. East	1	27	1
	Ex. East	1	17	2
4	222	1	15	17
	226	1	12	3
	Ex. East	1	30	14
	221	1	26	
5	222	1	30	14
	226	1	6	1
	Ex. East	1	17	1
6	226	1	6	3
	Ex. East	1	24	
	Ex. East	1	4	40
7	222	1	12	32
	226	1	2	13
	Ex. East	1	16	28
	Ex. East	1	33	
Total	24 Trains	24	435	



3000
Sheet No. 100

EXHIBIT A- Page 6.

NOVEMBER 1907 WEST

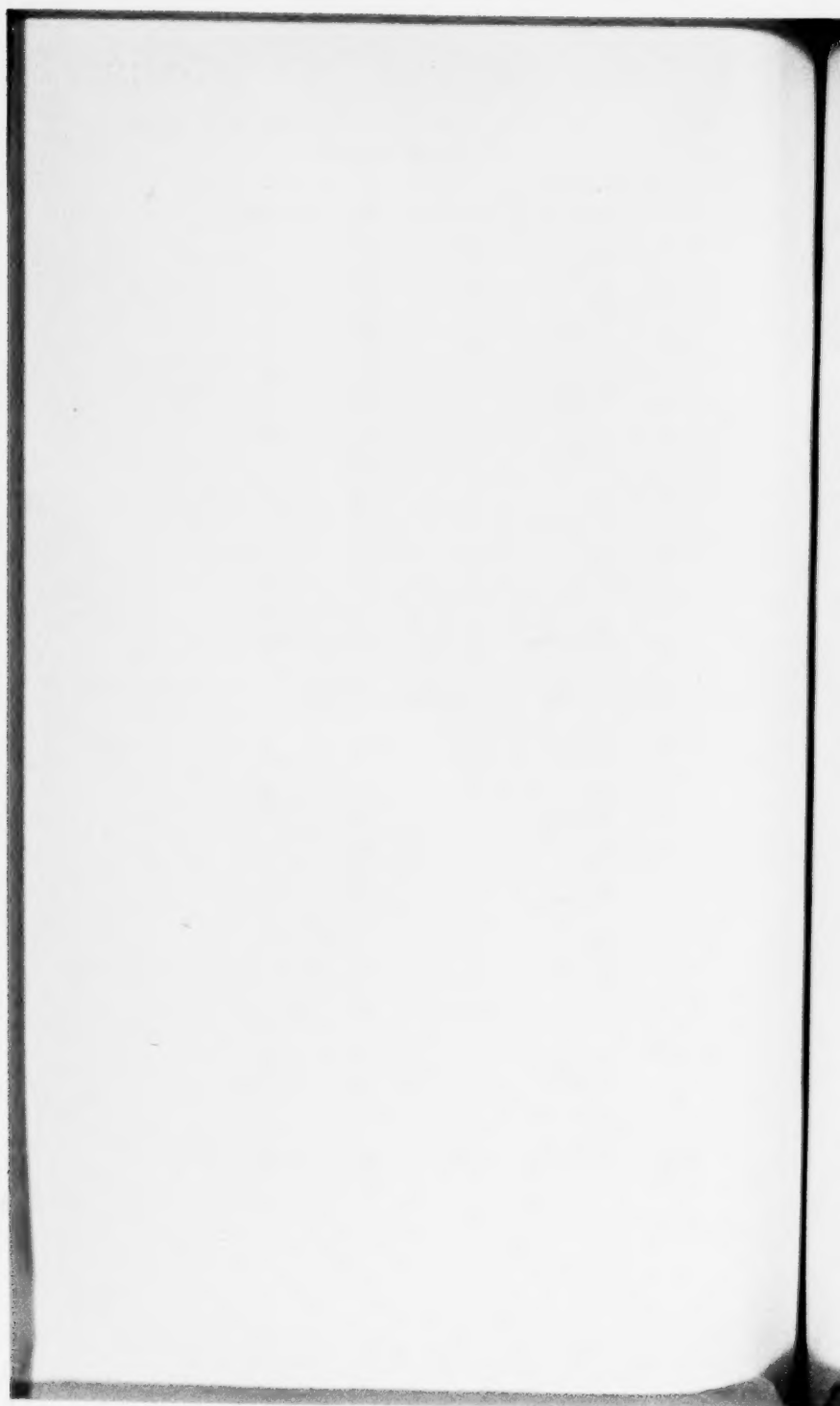
INTO ASHLAND FROM NORTH

DATE	TRAIN	NO OF ENGINE	LOAD	EMPTY
Nov. 1	221	1	26	
	225	1	10	
2	Ex. West	1	18	2
	221	1	26	
	225	1	5	
	Ex. West	1	22	1
	Ex. West	1	26	1
3	221	1	26	1
	Ex. West	1	19	20
	Ex. West	1	22	2
4	221	1	17	1
	Ex. West	1	5	
	Ex. West	1	28	
5	221	1	26	1
	225	1	8	
	Ex. West	1	25	
6	221	1	26	
	225	1	11	
	Ex. West	1	25	1
7	221	1	26	2
	Ex. West	1	26	
Total	21 Trains	21	427	32

OUT OF ASHLAND TO NORTH

NOVEMBER 1907 EAST

Nov. 1	Ex. East	1	25	21
	Ex. East	1	2	37
2	222	1	11	19
	226	1	12	14
	Ex. East	1	14	7
3	222	1	20	5
	226	1	9	4
	Ex. East	1	15	2
	Ex. East	1	16	18
4	226	1	23	1
	Ex. East	1	7	
	Ex. East	1	6	
	Ex. East	1	9	
5	222	1	23	
	Ex. East	1		Cab.
6	226	1	14	1
	Ex. East	1	9	19
	Ex. East	1	35	3
7	222	1	24	9
	226	1	8	6
	Ex. East	1	16	
Total	21 Trains	21	296	146



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- 1 -

SOUTHBOUND LUMBER SHIPMENTS THROUGH ASHLAND

	Commercial Lbr.	Co. Material
1899	3984 Cars	904 Cars
1900	5219	1495
1901	7048	2395
1902	7559	0
1903	4914	0
1904	4284	0
1905	5240	0
1906	6745	1456
1907	5436	3328

(Co. Material shipments include lumber, ties and piling)
 * (No record).

- 2 -

MOVEMENT OF LUMBER VIA PORTLAND

1902	2535 Cars
1903	2256
1904	1445
1905	3273
1906	6382
1907	7106

INTERCHANGE WITH O. R. & N. CO. AT PORTLAND

INTERCHANGE WITH SOUTHWEST PACIFIC SYSTEM AT ASHLAND

	Delivered to O. R. & N.			Received from O. R. & N.		
	Loads	Empties	Total	Loads	Empties	Total
OR 1905	8396	2946	11342	6064	4663	10729
1906	15435	3413	18848	9874	11761	20327
1907	16751	5110	21861	9381	12545	21926

Note: Inter-change with O. R. & N. includes switch cars.

500



- 3 Cont.

Pac. System	Delivered to Pac. Sys. at Ashland Loads	Empty	Total	Recd from Pac. Sys. at Ashland Loads	Empty	Total
1905	15219	470	15689	11303	4229	15532
1906	23194	690	23884	14475	7589	22064
1907	23017	1182	24199	14635	10071	24706

Note. For the year 1907, the interchange at Ashland by classes was as follows:

Box and Furniture	83%
Coal	13%
Flat	13%
Refrigerators	13%
Stock	4%
Tank Cars	4%
	<u>100%</u>

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AVERAGE LOADING ON LUMBER

	Via Ashland	Via Portland
Feb. 1906	-	29 tons
Feb. 1907	27 tons	30 "

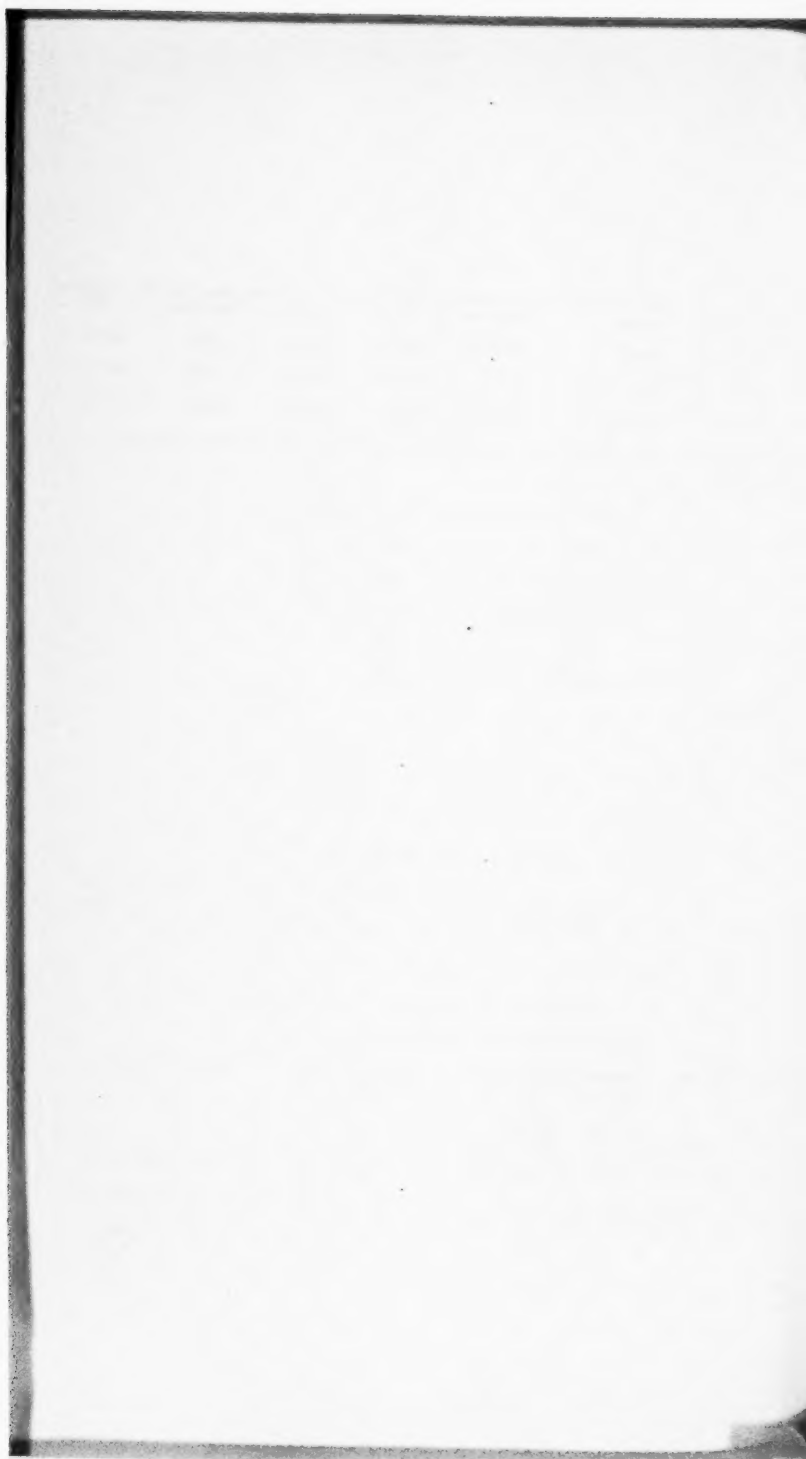
- 5 -

OREGON & CALIFORNIA RAILROAD

TONNAGE & EARNINGS STATISTICS

Year End.	Commercial Freight Tonnage	Earnings	Company Freight Tonnage	Total Tonnage
June 30, 1907	425925	\$853060.55		
Lumber	140996	\$30217.50		
Other Forest Prod	790402	\$217507.56		
All Other Freight	1857523	\$3370502.59	4 599649 tons	1756572 tons.

* Note. Cannot show details of Company tonnage, but it consisted almost entirely of lumber, ties, and piling.



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OREGON & CALIFORNIA RAILROAD

EARNINGS & EXPENSES STATISTICS

6,417,151.93
4,746,369.24
1,670,782.69

	1907	1906
Total Earnings	\$6,417,151.93	\$5,686,164.46
Total Passenger Earnings	2,773,374.98	2,561,966.08
Total Freight Earnings	3,370,502.59	2,710,431.54
Percentage of Operating Expenses to Earnings	74.28	77.72
Percentage of Operating Expenses and Taxes to Earnings	76.53	79.56
Freight Earnings per Freight Train Mile	\$2.94	\$2.37
Operating Expenses & Taxes per Revenue Train Mile	2.04	2.06
Cannot show Operating & Taxes per Freight Train Mile.		

Ratio of Operating Expenses to Earnings

	1907	1906
Main Line	49.43	76.56
Branches	101.04	64.61
Ratio of Operating Expenses and Taxes to Earnings		
Main Line	71.27	76.08
Branches	108.60	68.48

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COST OF WOOD

(Year ending June 30th, 1907)

	Reduced to Coal Basis
Coal \$4.54 per ton	\$4.54
Wood \$4.61 per cord	\$6.01
Oil \$0.70 per bbl	\$2.60

Covers lines North of Ashland and does not include any transportation charge on 1904.

- 8 -

CARS INTERCHANGED WITH S V C & W RY AT DALLAS, OKLA.

	1905		1906		1907	
	Loads	Empties	Loads	Empties	Loads	Empties
Recd from S V C & W Ry.	412	50	908	84	1120	55
Delvrd to "	77	565	341	551	482	53

- 9 -

CARS INTERCHANGED WITH O & S R RY COTTAGE GROVE, OKLA.

	1905		1906		1907	
	Loads	Empties	Loads	Empties	Loads	Empties
Recd from O & S R Ry.	752	5	930	7	1204	21
Delvrd to "	12	749	29	955	29	1151

- 10 -

CARS INTERCHANGED AT MOHAWK, OKLA.

	1905		1906		1907	
	Loads	Empties	Loads	Empties	Loads	Empties
Recd. Menasha Jo	1446	153	1064	247	1545	95
Del at "	526	945	614	954	495	1205

- 11 -

Cut of Company Mills on Wendling Branch from time of establishment to Dec. 31st, 1907:

35,034,496 feet Board Measure..

W.B.

Mill 1	established	August, 1906
" 2	"	November, 1906
" 3	"	April, 1907



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Following trains operated on Wendling Branch since completion of
Agfield-Henderson Cut-off, viz:

October 4th, 1906-- to January 18th, 1908

Passenger trains	6
Company officials	6
Freight	3
Mixed	1036
Net tons one mile	1399099
Gross "	4033741
Mileage 16 miles	

CHARTS

TOO

LARGE

FOR

FILMING

In the Circuit Court of the United States, Ninth Circuit, Northern District of California. In Equity.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Complainants,

v.

INTERSTATE COMMERCE COMMISSION, Defendant.

Demurrer.

The Demurrer of the Interstate Commerce Commission, the defendant above named, to the Amended Bill of Complaint of the Southern Pacific Company and the Oregon & California Railroad Company, the above named complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said complainants' amended bill to be true in manner and form therein stated, set forth and alleged, files this its demurrer; and for cause of demurrer shows that said complainants have not, as appears by said amended bill, made out any title to the relief therein prayed.

The defendant specially demurs to complainants' amended bill, and assigns as such grounds of demurrer:

1.

That it appears from the face of the said amended bill that all the proceedings required by the statute to be taken were duly taken and had; that after a formal complaint and answer a full hearing was had; and that the Commission arrived at its conclusion after being fully advised; that the order complained of was duly given, made, rendered and served; and that the conclusion of said Commission was not arbitrary, or reached through fraud; and, therefore, the act of the said Commission is final and conclusive, and not reviewable by the courts.

2.

That said amended bill does not set forth any fact or circumstance showing fraud or arbitrary action on the part of the Commission, and if it be claimed that the act of the Commission was in any way irregular or arbitrary the same is not set forth in the said amended bill of complaint.

III.

That it does not appear from said amended bill how or wherein the rates of \$3.10, \$3.40 or \$3.65 mentioned in said amended bill are, or that either or any of said rates is, or was, or will be, an unreasonably low rate; nor does it appear how or wherein the rate of \$5.00 mentioned in said amended bill was, is, or will be, a reasonable rate.

IV.

The said amended bill fails to state any fact or facts from which the court can determine from the face of the amended bill of com-

plaint that the rates complained of are unreasonably low or confiscatory. Said amended bill does not set out the cost of transportation of lumber or other merchandise, or the gross receipts of complainants or the gross expenses, or the net profits or loss as the case may be, or the cost of the carriage of a ton of lumber in carload lots from points in the Willamette Valley, exclusive of Portland, to San Francisco or Bay points, or any other fact or circumstance which, if true, would show that the rates fixed by the defendant were unreasonably low or confiscatory.

V.

That each and every portion of the amended bill which avers that the Act to Regulate Commerce as amended is unconstitutional does not state any ground for equitable relief.

VI.

That said amended bill does not state in facts well pleaded that the rates complained of are confiscatory, or would produce a loss to the complainants, but simply states that the rates complained of are unreasonably low and unremunerative, without stating the amount of profit, if any, said rates would produce, or what percentage of profit complainants consider to be a remunerative profit, and without stating in what degree, if any, or in what manner the rates fixed by the defendant are below the cost of the service.

VI.

That the amended bill is indefinite, vague, uncertain and ambiguous in, that it states merely the conclusion of the pleader, and does not allege any definite ultimate facts from which the court can determine whether the rates fixed by the Commission in its order complained of are unremunerative and less than the cost of the service performed.

VII.

That complainants have an adequate remedy at law.

VIII.

That from said amended bill of complaint there appear no facts which meet the objections urged by defendant, and found well founded by the court, to the validity of the original bill herein.

IX.

Wherefore, and for divers other good causes of demurrer appearing in said amended bill, this defendant demurs thereto, and humbly demands the judgment of this court whether it shall be compelled to make any other or further answer to said amended bill, and prays to be instantly dismissed, with its costs and charges in this behalf most wrongfully sustained.

UNITED STATES OF AMERICA,
State and Northern District of California,
City and County of San Francisco, ss:

Luther M. Walter makes solemn oath and says: That he is the attorney for the above named defendant, the Interstate Commerce Commission, and that the above demurrer is not interposed for purpose of delay, but that the same is true in point of fact.

LUTHER M. WALTER.

Subscribed and sworn to before me, this 1st day of October, 1908.

[SEAL.]

J. A. SCHAERTZER,
Deputy Clerk U. S. Circuit Court,
Northern District of California.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

LUTHER M. WALTER,
Solicitor for Defendant.

JOSEPH N. TEAL,
Of Counsel.

ROB'T T. DEVLIN,
U. S. Att'y, of Counsel.

At a stated term, to wit: the July term A. D. 1908 of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City and County of San Francisco, on Saturday the 3rd day of October in the year of our Lord one thousand nine hundred and eight.

Present: The Honorable William B. Gilbert, Circuit Judge; the Honorable Erskine M. Ross, Circuit Judge; the Honorable William W. Morrow, Circuit Judge.

No. 14760.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD
COMPANY

vs.

INTERSTATE COMMERCE COMMISSION.

Order Directing Counsel to Prepare Statement, etc.

Defendant's demurrer to the amended bill of complaint herein, heretofore heard and submitted to the Court for consideration and decision, and the same having been fully considered, and the Court being of a divided opinion on the question whether the demurrer shall be sustained and on the question whether, in this investigation, the court is to be confined to the case as made before the commission, it is ordered that counsel prepare a statement for the purpose of

certifying the case to the Supreme Court of the United States. P. F. Dunne, Esq., solicitor for complainants, made application to the Court that the status quo should be preserved, which application, after consideration by the Court, was denied, to which ruling of the Court Complainants then and there excepted.

At a stated term, to wit: the November term A. D. 1909 of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City and County of San Francisco, on Monday the 31st day of January in the year of our Lord one thousand nine hundred and ten.

Present: The Honorable William B. Gilbert, Circuit Judge; the Honorable Erskine M. Ross, Circuit Judge; the Honorable William W. Morrow, Circuit Judge.

No. 14760.

SOUTHERN PACIFIC Co. et al.

VS.

INTERSTATE COMMERCE COMMISSION.

Order Sustaining Demurrer to Amended Bill.

Defendant's demurrer to amended bill of complaint herein came on this day to be further heard. Robert T. Devlin, Esq., United States Attorney, Luther M. Walter, Esq., Special Assistant United States Attorney and J. N. Teal, Esq., appearing upon behalf of defendant and F. C. Dillard and C. W. Darrow, Esqs., appearing upon behalf of complainants. Mr. Walter moved the Court for leave to withdraw the demurrer to the amended bill, filed October 1st, 1908, and for leave to file a demurrer and answer to the amended bill of complaint herein; and counsel for complainants not objecting thereto; it was ordered that said motion be and the same is hereby granted; Thereupon said demurrer, was by the Court, ordered sustained; and complainants were granted leave to file a replication to the answer. Thereupon Mr. Dillard, on behalf of the complainants, presented to the Court a Stipulation as to the record herein, which said stipulation was by the Court ordered filed. Complainants introduced in evidence the Record and proceedings had before the Interstate Commerce Commission. Complainants also introduced Report and Order of Commission and dissenting opinion of Commissioners, Harlan and Knapp.

Thereupon the case was argued by counsel for the respective parties and was submitted to the Court for consideration and decision.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14760. In Equity.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Demurrer and Answer of Interstate Commerce Commission to the Amended Bill of Complaint of the Above-named Complainants.

Robert T. Devlin, United States Attorney, Luther M. Walter, Special Assistant United States Attorney, Solicitors for Defendant. J. N. Teal, of Counsel.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14760. In Equity.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Demurrer and Answer of the Above-named Defendant, Interstate Commerce Commission, to the Amended Bill of Complaint of the Above-named Complainants, Southern Pacific Company and Oregon and California Railroad Company.

(1.)

Demurrer.

This defendant, Interstate Commerce Commission, by protestation, not confessing or acknowledging all or any of the matters and things in the said amended bill contained to be true in such manner and form as the same are therein set forth and alleged, as to so much of the amended bill (Par. IV and Par. V.) as seeks to aver that the Act to Regulate Commerce as amended June 29, 1906, is unconstitutional and void, does demur thereto, and for cause of demurrer shows that said complainants have not, as appears by said portions of their said amended bill, made out any title to any equitable relief.

Defendant specially demurs to said portion of complainants' amended bill and assigns as such grounds of demurrer:

I.

That the power to prescribe maximum rates to be charged in the future on interstate traffic has constitutionally been delegated by Congress to the Interstate Commerce Commission.

II.

That the Interstate Commerce Commission, in hearing and considering evidence and arriving at conclusions regarding the reasonableness of rates to be established, proceeds in accordance with due process of law and does not therein or thereby exercise the judicial power invested by the constitution in the courts of the United States.

III.

That in entertaining complaints for reparation and in granting orders for the payment of money thereon, which orders are prima facie evidence of damages owing to complainant before this defendant, the Interstate Commerce Commission does not exercise such a purely judicial function as is forbidden by the constitution.

IV.

That the provision of the statute which authorizes the Interstate Commerce Commission to entertain complaints for reparation and to grant orders for the payment of money thereon is entirely separable and distinct from the remaining provisions of the Act to regulate Commerce as amended and does not in any wise affect the constitutionality or validity of the remaining portions of the act.

V.

That whether or not in entertaining complaints for reparation and in granting orders for the payment of money thereon, the Interstate Commerce Commission does exercise, such a purely judicial function as is forbidden by the Constitution can not be drawn in question in this case for that there is no allegation that this defendant has exercised such power.

VI.

That the portion of the Act to Regulate Commerce as amended which provides for penalties for willful disobedience to the orders of the Commission is not offensive to the fifth amendment to the constitution.

VII.

That the portion of the Act to Regulate Commerce which provides for penalties for willful disobedience to the orders of the Commission is entirely separable from the remaining portions of the statute and does not in any wise affect the constitutionality or validity of the remaining portions of the statute.

VIII.

That whether or not the penalties, prescribed in the Act to Regulate Commerce, as amended, for wilful disobedience to the orders of the Commission would render the statute in that regard offensive to the fifth amendment to the constitution, can not be drawn in question in this case for that it affirmatively appears that the complainants while seeking relief in this court are observing and obeying the said order of the Commission and are not exposed to prosecution for penalties or forfeitures.

IX.

That in providing for penalties against common carriers violating the Act to regulate Commerce by disobeying the orders of the said Commission, the statute does not offend the fifth amendment to the Constitution for that the statute expressly authorizes a suit in the Circuit Court of the United States to enjoin, suspend, or set aside, the orders of the Commission either before or after such orders become effective, and said statute further confers jurisdiction and lays the venue for the judicial hearing according to established methods before any penalties or forfeitures can be declared, thereby preserving due process of law.

X.

Wherefore for these and divers other good causes for demurrer appearing in said amended bill, defendant prays the judgment of this honorable Court whether it shall be compelled to make any answer to such parts of the said amended bill as it has hereinbefore demurred to.

UNITED STATES OF AMERICA,

State and Northern District of California,

County and City of San Francisco, ss:

Luther M. Walter makes solemn oath and says: That he is solicitor for the above-mentioned defendant, Interstate Commerce Commission, and that the above demurrer is not interposed for delay, but that the same is true in point of fact.

LUTHER M. WALTER.

Subscribed and sworn to before me this 31 day of Jan. 1910.

[SEAL.]

SOUTHARD HOFFMAN,

Clerk U. S. Circuit Court.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

ROBT. T. DEVLIN,

LUTHER M. WALTER,

Solicitors for Defendant.

J. N. TEAL, *Of Counsel.*

(2)

Answer.

And the defendant, the Interstate Commerce Commission, not waiving the said several demurrers but wholly relying and insisting thereon, for answer to so much of the residue of said amended bill as it is advised that it is material or necessary for it to make answer unto, answering says:

I.

That the defendant is a bureau or department of the Government of the United States, and was created and established and now exists under and by virtue of an Act of the Congress of the United States, entitled "An Act to Regulate Commerce," approved February 4, 1887, as amended by subsequent Acts, and particularly as amended by the Act of June 29, 1906, and that the complainant, Southern Pacific Company, a corporation duly incorporated under the laws of the State of Kentucky, and the complainant, the Oregon & California Railroad Company, a corporation duly incorporated under the laws of the State of Oregon, are common carriers engaged in the interstate transportation of passengers and property wholly by railroad, or partly by railroad and partly by water, and as such common carriers and in respect to such transportation are subject to the provisions of said Act entitled "An Act to Regulate Commerce," and amended by said Act of June 29, 1906.

II.

That by Sec. 12 of said Act this defendant is given authority to enquire into the management of the business of all common carriers subject to the provisions of said Acts, and is required to keep itself informed as to the manner and method in which the same is conducted, and is "authorized and required to execute and enforce the provisions of" said Act; and that among the provisions of the Act which this defendant is authorized and required to execute and enforce are the provisions of Sec 1 thereof, which declares that "all charges made for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

III.

That by Sec. 13 of said Act, as amended, it is provided that, among others, any person, or corporation, or association, or mercantile, or manufacturing society may make complaint to this defendant by petition, briefly stating the facts, "of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof;" that a "statement of

the charges thus made shall be forwarded" by this defendant "to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified" by this defendant; that if such common carrier "shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty" of this defendant "to investigate the matters complained of in such manner and by such means as it shall deem proper."

That by Sec. 14 it is provided that whenever an investigation shall be thus made by this defendant, "it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of "this defendant, together with its decision, order or requirement in the premises;" and that all reports of investigations made by this defendant "shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of."

That by Sec. 15 it is provided that this defendant "is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in Sec. 13" thereof, "it shall be of the opinion that any of the rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers," subject to said Acts, "for the transportation of persons or property as defined in the first section," of said Acts "are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions" of said Acts, "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged;" "and to make an order that the carrier shall cease and desist from such violation, to the extent to which" this defendant "finds the same to exist and shall not thereafter publish, demand or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed."

That by Sec. 16 it is provided that every order of this defendant "shall be forthwith served by mailing to one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be *prima facie* evidence of the receipt of such order by the carrier in due course of mail;" and this defendant is "authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

IV.

That on or about November 15, 1907, the Western Oregon Lumber Manufacturers' Association, a voluntary association of lumber producers of the State of Oregon; H. M. Parvin, Crusan Bros., a co-partnership; J. H. Chambers, individually; Willamette Valley Lumber Company, Falls City Lumber Company, Curtiss Lumber Company, Charles K. Spaulding Logging Company, and the Booth-

Kelly Lumber Company, all corporations organized under the laws of the State of Oregon, in pursuance of said Sec. 13 of said Act made complaint by petition to this defendant against Southern Pacific Company and Oregon & California Railroad Company, alleging, among other things, that on or about March 10, 1907, the said Southern Pacific Company filed with this defendant, effective April 18, 1907, Local Freight Tariff No. 47, I. C. C. No. 2874, naming rates for transportation of lumber and its products between points on Southern Pacific Company's lines in Oregon and points on Southern Pacific Company's lines in the State of California, which tariff superseded the tariff theretofore in effect, I. C. C. No. 2268; that under said tariff, I. C. C. No. 2874, effective said April 18, 1907, the interstate rates for the transportation of lumber and its products from points in the State of Oregon to points in the State of California as aforesaid were largely advanced over rates immediately theretofore in effect; that prior to said 18th day of April, 1907, the rates on green common rough fir lath and lumber and forest products from Willamette Valley points to San Francisco and Bay points, in accordance with tariffs lawfully published and filed, had been made on a basis of \$3.10 per ton; that said rates had been voluntarily established by said Railroad Companies about the year 1898 and had thereafter substantially been continuously in effect; that complainants and others engaged in the lumber business in the Willamette Valley in the State of Oregon had invested in plants, machinery, equipment and appurtenances in a very large sum, amounting to several million dollars; that a large number of persons in said district were directly engaged in the lumber industry; that the entire population therein was vitally affected by the continuance and prosperity of said industry; that the railroad companies falsely assuming that the lumber industry in the Willamette Valley was enjoying an era of great prosperity, manufacturing products continually increasing in value, and claiming the right to share in such prosperity, advanced the rate as aforesaid from \$3.10 per ton of 2000 pounds to \$5.00 per ton of 2000 pounds; that said increase in rates as above set forth was unjust, excessive, unreasonable, extortionate, prohibitive and discriminatory, and in contravention of the Act to Regulate Commerce as amended that the tariff in effect just prior to said 18th day of April, 1907, was and still is fair, just, reasonable and remunerative for said Railroad Companies.

V.

That a copy of said petition or complaint was duly served upon said Southern Pacific Company and Oregon & California Railroad Company, and thereafter, on December 6th, 1907, said Southern Pacific Company and Oregon & California Railroad Company duly filed with this defendant answers to said complaint, traversing the allegations of said petitions, setting up answer thereto to the effect that they, said Railroad Companies, had filed local freight tariff No. 47, I. C. C. No. 2874, effective April 18, 1907, making advances in the rates of transportation, superseding

rates named in Tariff I. C. C. No. 2268; that immediately prior to said April 18, 1907, rates on rough green fir lumber and lath were in effect as follows: From Portland, East Portland, California-Oregon State line, and points between on their lines, known as East Side Main Line of the Southern Pacific Company, in the State of Oregon, including points on the Woodburn-Springfield Branch (Tallman and South), and the Lebanon Branch to San Francisco, the rate was \$3.10 per ton of 2,000 pounds; to intermediate and other points the rate was based on said rate of \$3.10 per ton, being said sum of \$3.10 and the local rate from San Francisco to point of destination, with a maximum rate of \$5.00 per ton; to points known as San Francisco Bay points, the rate was \$3.10 per ton of 2,000 pounds; from all points on the complainants' lines known as West Side and Yamhill Divisions, except Portland, including Sheridan Branch, immediately prior to April 18, 1907, 25 cents per ton higher than the rates from the East side, with a maximum of \$5.00 per ton.

Said railroad companies further alleged that Portland is situated where it is reached by tidewater; that plants manufacturing lumber in Portland and at nearby points were situated on the ocean highway; that in 1899 San Francisco Bay points and other points through the port of San Francisco could be reached by lumber carried in sailing vessels and steamships from lumber plants situated on Puget Sound and at various other places in the States of Washington and Oregon contiguous to the ocean; that rates by water from such places to said places in California were low, being about \$3.00 per ton; that in order to compete with the water carriers and to bring the products from mills situated on its lines to California points, in 1899 said railroad companies established the rate of \$3.10; that said rate was exceedingly low and unremunerative, and was established because of water competition and to enable said companies to carry lumber from and to said points; that the rates as established in 1898 were not made to induce investments in the lumber industry; that said companies neither by their officers, agents, or otherwise encouraged the investment of capital in the lumber industry, or that any capital was invested as a result of said rates; that complainants had not relied, or had the right to rely, on said rates being indefinitely continued; that complainants and all others investing in the lumber business knew that the rates as fixed in 1898 were low, unremunerative, and established by reason of water competition and likely to be advanced at any time; and denied that the increase in rates complained of was unjust, excessive, unreasonable, extortionate, prohibitive, discriminatory, or in contravention of the Act to Regulate Commerce as amended.

It was averred that under the increased rates shippers could still reach the markets formerly reached, and by reason of changed conditions could obtain a better price and higher profit than could have been obtained on the former rate.

It was further averred that at the time of the raising of the rate, conditions had in all respects changed from those theretofore existing, and that the increase to \$5.00 was made solely to obtain a fair remuneration for the service performed.

This defendant, after the said matter of complaint had been fully presented to it, both in the way of testimony and argument in behalf of both parties, after both parties had announced that they had no further evidence to present, after having duly investigated and considered the facts and questions presented, and after a full hearing, made a report in writing in respect thereto, as required by Sec. 14 of said Act to Regulate Commerce, as amended, setting forth in said report the material facts as found by this defendant and the finding of this defendant therefrom, together with its order in question in this suit, the said finding being that upon rough, green fir lumber and lath the rate of \$5.00 per ton from all mills in the Willamette Valley, not including Portland, to San Francisco and San Francisco Bay points, was unjust and unreasonable to the extent that it exceeded \$3.40 per ton from points upon the East bank and the West bank South of Corvallis, and to the extent that it exceeded \$3.65 per ton from points upon the West bank North of Corvallis, not including Portland.

The order, in pursuance of said finding, required said railroad companies to establish and put in force on or before August 15, 1908, and to maintain in force thereafter during a period of not less than two years, and to apply to the transportation of rough, green fir lumber and lath in carloads, a rate not exceeding \$3.40 per ton from points upon the East bank of the Willamette River, and upon the West bank thereof South of Corvallis to San Francisco, California, and Bay points, and a rate not exceeding \$3.65 per ton from points upon the West bank of said river North of said Corvallis, not including Portland, Oregon, to said San Francisco, and Bay points.

A copy of said report and order is hereto attached as Exhibit "A" and prayed to be taken as part hereof.

VI.

That this defendant, by reason of the experience of its members in matters connected with rates of transportation by railroad and their great opportunity for full information as to all material facts and circumstances which go to determine what is a reasonable rate for the transportation of any particular kind of traffic and all other questions arising under the Act to Regulate Commerce and Act amendatory thereto, is an expert board or tribunal; that its findings, conclusions and orders in this case, as in all cases arising under said Acts, are not arrived at through *ex parte* proceedings or investigations, but are made after notice, full hearing, and by due process of law, and are the results of investigating all material facts and circumstances, and that in such investigations this defendant avails itself of every avenue of information afforded by complainant or defendant, or of matters within its official cognizance; that the findings, conclusions and orders of this defendant so arrived at are final and conclusive upon all questions of fact heard and determined, and should not be set aside by the courts except it clearly appear that this defendant has acted arbitrarily, fraudulently, without regard to the procedure prescribed by the statute, or has deprived a carrier of a constitutional right.

VII.

That the burden is upon complainants in this case to show to the full satisfaction of the Court that the order made by this defendant and made the basis of this suit was irregularly made or deprives the complainants of due process of law, or that the rates prescribed in said order are confiscatory. It is not sufficient that the complainants do no more than raise a mere doubt in the mind of the Court. That the amended bill of complaint herein does not allege or show that the order complained of was not regularly made. That there is no allegation in said amended bill of complaint that complainants have discovered and will adduce any new testimony or testimony in addition to that submitted to this defendant or that was not considered by this defendant in making the order complained of, and that no petition for rehearing before this defendant has been made by or on behalf of complainants, or either of them, as to any matter or thing embraced in said report, decision or order. That there is no sufficient allegation of any deprivation of any constitutional or statutory right in said amended bill.

VIII.

That prior to the year 1898 no lumber was shipped by rail from points in the Willamette Valley in the State of Oregon to San Francisco in the State of California and adjacent points; that being desirous of developing the lumber industry in the Willamette Valley, in order to sell part of complainants' lands which abounded in timber, and in order to secure traffic for their lines of railroad, complainants through their officers, agents and employees made overtures to lumbermen to investigate the practicability of cutting fir timber and converting the same into lumber and other products and shipping the same to markets at San Francisco and other points; that previous to this time plants for the manufacture of lumber were all small sized and the investments in such plants were insignificant, the only lumber cut being that for local consumption. In 1897 R. A. Booth operated a mill in the Southern part of Oregon for the cutting of pine lumber. About said time the complainant Southern Pacific Company, advised Mr. Booth that it believed that fir timber could be profitably manufactured into lumber, although it was doubtful whether the Oregon fir could enter markets of consumption on equal terms with the fir lumber from Puget Sound. At the same time complainant put into effect a rate of \$3.10 per ton based primarily upon the rate by water from Portland to San Francisco, which rate was higher than the charter rate. At said time there was no affiliation between complainants herein and the Union Pacific Railroad Company, or its allied lines, and there was therefore no outlet for lumber from the Willamette Valley through the Portland gateway. The only possible market open to Willamette Valley lumber was to the South, over the lines of complainants. Lumbermen from points in the Willamette Valley could market their lumber only by having a rate which was fairly equivalent to the water rate from Portland to San Francisco plus the local rate from San Francisco to the consuming market. This latter condition is the condi-

tion now. Branch lines of railroad in the Willamette Valley were constructed from the complainants' main line to the mills, the expense of such construction being borne in some cases by the complainants, in some cases by the lumbermen, and in other cases by both complainants and lumbermen. Complainants sold timber land to lumbermen with the understanding that the timber should be manufactured into lumber and should be shipped in certain quantities over complainants' lines. The original rate of \$3.10 per ton applied on all kinds of lumber, both green and dried. At first it applied only to the section in which the Booth mills were located, but later was extended to the entire Willamette Valley including Portland. Under this rate many mills were established and the lumber industry became the leading business of the Valley. On or about December 3, 1903, complainants withdrew the rate of \$3.10 from Portland and established a rate of \$5.00 per ton, and on January 1, 1904, withdrew said rate of \$3.10 per ton from all points in the Willamette Valley and established instead the rate of \$5.00 per ton. The immediate effect of this increase on the operation of the mills in the Willamette Valley was to cause the suspension of operations at some of said mills and greatly tended to complete suspension at many other of said mills. An earnest protest to complainants was made by the lumber manufacturers and shippers and the chief traffic official of complainants, one J. C. Stubbs, visited the Willamette Valley and made a personal investigation of the situation with regard to rates that should be charged for shipments of lumber to San Francisco and Bay points. As a result of this personal investigation and conference with lumbermen, in May 1904 complainants withdrew the \$5.00 rate and restored the \$3.10 rate, restricted, however, to rough, green fir lumber and lath, and applied from all points in the Willamette Valley except Portland, to San Francisco and Bay points. Immediately after the \$3.10 rate was restored in May 1904, the lumber industry in the Willamette Valley revived, and operations which had been stopped or greatly retarded were resumed. Mills that had been closed were again opened. Contracts that had been held in abeyance on account of the increase in rates were completed, and in every way the lumber business in the Valley showed a great stimulus. Without the \$3.10 rate the lumber industry in the Willamette Valley would not have been developed, mills would not have been erected and the timber land could not have been sold. At the time of making the order for the defendant, the \$5.00 rate had closed San Francisco as a market for rough, green fir lumber and lath.

IX.

There are about two hundred and fifty (250) lumber mills in the Willamette Valley, not including Portland, with a capacity of 1,300,000,000 feet per annum. The average annual output of said mills is slightly less than 1,000,000,000 feet. Of this amount one-third is consumed locally and two-thirds is shipped out over the lines of complainants. Complainants use a great portion of the lumber consumed locally.

Rough, green fir lumber weighs 3300 pounds to the 1000 feet.

The average profit from the manufacture of fir lumber in the Willamette Valley during the last eight years has been between \$1.50 and \$2.50 per thousand feet. The increase in the freight rate from \$3.10 to \$5.00 per ton is much greater than the average profit and exceeds the profit from the manufacture of fir timber. The trees from which the lumber is cut are small and the proportion of high grade lumber is less than where the trees are larger, as in Washington, with which latter lumber the Oregon fir competes in the San Francisco market. There is no market for inferior grades of fir lumber in the East or elsewhere than San Francisco. In order successfully to operate a mill in the Willamette Valley the manufacturer must be able to dispose of his poorer grades of lumber. This can be done only at San Francisco. The rate of \$5.00 per ton destroyed this market for the poorer grades of lumber. The increase from \$3.10 per ton to \$5.00 per ton is equivalent to an advance in rate of \$3.13 per thousand feet of lumber.

X.

Rough, green fir lumber is hauled over the same line of road today as that over which it was hauled in 1898. Charter rates for lumber between Portland and San Francisco are practically the same today as in 1898. Labor and supplies have slightly increased but the capacity of engines is much greater than in 1898. Complainants have largely increased the carload minimum during the same period. In the year 1897 the gross earnings from operation upon the lines of complainants over which this lumber was hauled were \$1,436,037., and operating expenses \$1,112,835, leaving net earnings of \$323,202, and the same figures for 1907 were, gross earnings \$6,417,153, operating expenses \$4,766,350, net earnings \$1,650,803. Complainants have included, each year, in their operating expenses large expenditures for permanent improvement and equipment. The mileage operated in 1897 was 654 miles, in 1907 665 miles, of which about 300 miles are main line and the balance branches. Any increased expense incurred by complainants in the conduct of their transportation business has been more than offset by increased business and economy of operation.

XI.

The rate of \$3.10 has always yielded, and would in the future, yield, a substantial return over and above the cost of the service. The rates fixed by this defendant, \$3.40 from all points in the Willamette Valley, East Side Main Line, excluding Portland, and \$3.65 from all points west of the main line, north of Corvallis, excluding Portland, are just and reasonable rates, are fully remunerative to the carrier, allow the lumber traffic to move, are in no degree confiscatory, produce no loss to both or either of complainants, and produce a fair return to complainants for the service performed.

XII.

Since the bringing of this suit, this defendant, upon the application of complainants, has extended the time within which the order complained of shall become effective from August 15 to October 15, 1908.

XIII.

This defendant denies that it did not find the rate of \$5.00 per ton to be unreasonable, and avers that it did find such rate to be unreasonable and unjust. This defendant admits that it did find the rate of \$3.10 to be a low rate, but it denies that it found such rate to be unreasonably low. Defendant denies that the rate of \$3.40 and the rate of \$3.65 are substantially the same as the rate of \$3.10. Defendant avers that green fir lumber and lath is and can be carried by complainants without appreciable risk of damage in transit. It moves in volume regularly throughout the year, is hauled on the least expensive cars, and is loaded and unloaded by the shipper or consignee. It is an article of wide consumption, and is entitled relatively to as low a rate as is provided for any other commodity. Defendant avers that the rate of \$3.10 is not at issue in this case; that defendant made no requirement that complainants should put in effect any such rate, but on the contrary allowed complainants to put into effect an increase of 30 cents per ton over the rate which complainants voluntarily had in effect for many years. Defendant denies that the rates of \$3.40 and \$3.65 per ton as ordered and prescribed by it were or are unreasonably low rates, or will continue so to be during the period fixed for the application of the same by the Commission; denies that said rates are or will be during said period less than what is just and reasonable for the service rendered; and denies that said rates do not or will not during said period pay the cost of the service rendered. Avers that the rates prescribed in this order and made the basis of this suit are just and reasonable and in every sense remunerative to the carriers and are just to the shippers and to the public.

XIV.

Defendant denies that, in making the order complained of, it exceeded in any wise any power granted it by law, but on the contrary avers that in every action in its findings, conclusions and order it complied strictly with the Statute and with the Constitution of the United States.

This defendant denies all the material allegations of said amended bill of complaint inconsistent with the allegations set forth in this answer from paragraphs 1 to 14 thereof, both inclusive; and now having fully answered said amended bill of complaint in so far as it is advised is necessary to be answered denies that complainants herein are entitled to the relief or any part thereof in said amended bill of complaint demanded, or any relief whatsoever, and prays to be instantly dismissed with its reasonable costs in this behalf wrongfully sustained.

INTERSTATE COMMERCE COMMISSION,
By ROBT T. DEVLIN,
LUTHER M. WALTER,
Solicitors.

J. N. TEAL,
Of Counsel.

EXHIBIT "A" TO ANSWER OF DEFENDANT HEREIN.

Before the Interstate Commerce Commission.

No. 1331.

WESTERN OREGON LUMBER MANUFACTURERS' ASSOCIATION et al.

v.

SOUTHERN PACIFIC COMPANY et al.

Submitted March 6, 1908. Decided June 1, 1908.

Teal & Minor for complainants.

W. H. Abel for interveners.

W. F. Herrin, P. F. Dunne, W. W. Cotton, and F. C. Dillard for defendants.

Report and Order of the Commission.

No. 1331.

WESTERN OREGON LUMBER MANUFACTURERS' ASSOCIATION et al.

v.

SOUTHERN PACIFIC COMPANY et al.

Submitted March 6, 1908. Decided June 1, 1908.

1. Where a rate has been established and maintained for a considerable period for the purpose of developing a particular industry and with full knowledge that the industry could not be developed without it, and where, under the influence of such rate, large amounts of money have been invested in property the value of which must be seriously impaired by an advance of the rate, that fact is an important consideration in passing upon the reasonableness of such advance.

2. The Southern Pacific Company established a rate of \$3.10 per ton upon rough green fir lumber and lath from points in the Willamette Valley to San Francisco for the purpose of developing the lumber industry in that section, and maintained the rate in effect, with a brief interval, for six years; and on the strength of this rate that industry attained considerable proportions. In April, 1907, this rate was advanced to \$5 per ton; Held, That the advance was unreasonable and that the rate ought not for the future to exceed \$3.40 per ton.

Teal & Minor for complainants.

W. H. Abel for interveners.

W. F. Herrin, P. F. Dunne, W. W. Cotton, and F. C. Dillard for defendants.

*Report of the Commission.**PROUTY, Commissioner:*

On April 18, 1907, the Southern Pacific Company advanced the rate on rough green fir lumber and lath from certain points in the Willamette Valley to San Francisco, from \$3.10 to \$5 per ton, and the lawfulness of that advance is before us in this proceeding. The rate of \$3.10 applied from all mills upon the east bank of the Willamette River and from mills south of Corvallis, upon the west bank of that river. From mills north of Corvallis, upon the west bank, an additional charge of 25 cents per ton was imposed. The rate did not apply from Portland itself.

The new rate of \$5 per ton, established April 18, applies to all mills in the Willamette Valley upon both sides of the river, including Portland. The complainants ask to have the \$3.10 rate restored at those points to which it formerly applied, on the east of the river, and also that it be extended to mills upon the west of the river. Certain lumber manufacturers whose mills are located at Portland have intervened with the prayer that the \$3.10 rate be accorded to mills at Portland. Three questions are therefore presented by the record.

First. Shall the \$3.10 rate be restored to those points to which it formerly applied?

Second. Shall it be extended to mills upon the west bank of the Willamette River?

Third. Shall mills at Portland be given the benefit of this rate?

To an understanding of the questions presented a brief reference to the development of the lumber industry in the Willamette Valley seems necessary.

Previous to 1898 no lumber was cut in that valley except such as was necessary to supply the local consumption. The ocean could only be reached at Portland upon the north after a rail haul of considerable length and upon a comparatively high rate, so that lumber cut in the Willamette Valley could not find a market by water in competition with that produced at Portland. The rate to the south was so high as to prohibit shipments in that direction in competition with water carriage from Portland. About 1898 the Southern Pacific Company became convinced that it ought to adopt a policy which would develop the lumber industry along its lines in the Willamette Valley. At that time it had no affiliation with the Union Pacific Railroad or its allied lines and therefore could obtain no outlet for this lumber through the Portland gateway. Since both the Oregon Railroad & Navigation Company and the Northern Pacific Company had extensive lumber interests of their own which they were bound to protect, the only possible market was to the south and to points in the east reached via the south.

For several years rates had been in effect from Puget Sound territory and from Portland to Utah, Colorado, and other eastern destinations. In order that lumber produced in the Willamette Valley might be given a market in competition with Washington

and Portland mills in this territory it must go south to Sacramento and east over the lines of the Southern Pacific. There was also an extensive market in San Francisco and adjacent territory. This market could be reached from Portland and from points upon Puget Sound by water, and lumber arriving at San Francisco by water could there be loaded upon the cars and shipped by rail both to nearby interior points and to the eastern points above mentioned. In order, therefore, to give this lumber of the Willamette Valley a market it was absolutely essential to establish a rate from that territory to San Francisco which was fairly equivalent to the water rate from Portland and from corresponding points. This was perfectly understood by all parties and the determination of the Southern Pacific was to do precisely this thing.

What actually occurred in that valley can be best shown by considering the history of the operations of the Booth-Kelly Company, which was the first operator in the field and which is to-day the largest producer of lumber in that region. In 1897 Mr. Booth was running a mill in the southern part of Oregon for the cutting of pine, which is used mainly for sash and doors and cabinet purposes. An opportunity presented itself to lease a mill which had just been constructed for the manufacture of fir, and the Southern Pacific Company applied to him stating that a determination had been reached to make this lower rate and asking him to lease this mill. At that time the merchantability of Oregon fir in competition with Puget Sound fir and other lumber had not been demonstrated, but Mr. Booth, believing that the experiment was worth trying leased this mill for a year and the railroad company put in a rate of \$3.10 per ton.

An actual test showed Mr. Booth that this lumber would sell in competition with other fir in the San Francisco market and also convinced him that he could profitably manufacture upon the rate proposed. He therefore entered into negotiations with the Southern Pacific Company for the purchase of a tract of timber land embracing about 17,000 acres. In order to reach this land it was necessary to construct a railroad some 20 miles in length, which the Southern Pacific undertook to do upon condition that Mr. Booth should ship over the road for the first year a certain number of carloads of lumber, that he should pay an arbitrary rate of so much per ton over this branch road, and that he should take off the lumber from the tract in question within a given time.

Mr. Booth testified—and there can be no doubt of the fact—that previous to the making of this contract and as the basis of all his operations it was understood between him and the railroad company that a rate to San Francisco should be put in and maintained which was fairly equivalent to the water rate from Portland and that he should also be given a rate via Sacramento to various eastern points in Idaho, Utah, and Colorado. In accordance with this understanding the Southern Pacific established in 1899 a rate of \$3.10 per ton upon lumber to San Francisco and bay points. This original rate applied to all kinds of lumber both green and dry. At first it was only applicable to the section in which the

Booth mills were located, but was very soon extended to the entire Willamette Valley, including Portland.

Under the stimulus of this rate the lumber business in the Willamette Valley rapidly developed. The Booth-Kelly Company extended its own operations, and many other mills sprang up, until, in 1904, that industry had reached very considerable proportions.

In the latter part of 1903 the \$3.10 rate was withdrawn from Portland, and in January, 1904, it was withdrawn from the entire Willamette Valley, a rate of \$5 being established instead. The testimony in this case shows that the effect of the putting in of the \$5 rate was, or would have been if continued, to practically suspend the operations of these mills. They made this representation with great earnestness to the Southern Pacific Company, and finally the leading officials of that company, among others its chief traffic director, visited the scene of these operations. As a result of this personal inspection and after further consideration that company announced that while the rate never ought to have been made at the outset, inasmuch as it had been, that company would continue it for the future, but would limit it to rough lumber shipped green. Acting upon this announcement, the Southern Pacific Company did, in May, 1904, make effective once again this rate of \$3.10, which was now, however, applied not to all lumber, but only to rough green fir lumber and lath.

As showing the importance which lumber manufacturers in this region attached to the \$3.10 rate, what occurred at the time this rate was withdrawn in 1904 in a particular instance may be mentioned. A certain operator who owned one mill already had arranged, in the year 1903, to purchase a considerable quantity of timber and to erect a large mill. When rumors of the withdrawal of the \$3.10 rate became rife he suspended his negotiations, but after the rate was re-established in 1904, believing from what the officials of the Southern Pacific had said to him that this company had now finally determined upon the maintenance of this rate as a permanent policy, he purchased his land and resumed the building of his mill, and has since constructed still another mill and purchased some 800,000,000 feet of timber.

There can be no question but what the existence of this industry in anything like its present proportions in the Willamette Valley is almost entirely due to the establishment of this \$3.10 rate. Without it the mills would not have been built nor the timber which these operators own purchased, nor could the business have been profitably conducted during recent years upon the present rate of \$5 per ton. The complainants insist that a maintenance of the present rate will shut up their mills and very largely depreciate their timber investments.

There are some 250 mills in the Willamette Valley, not including Portland, with a capacity of perhaps 1,300,000,000 feet per annum, although the actual cut of these mills has never exceeded in any one year 1,000,000,000 feet, of which about two-thirds is shipped out by rail over the lines of the defendants, the balance being consumed locally. A considerable part of this so-called local consumption is

purchased by the railroad itself for its own use. The Booth-Kelly Company manufactures nearly one-seventh of the entire output of the valley and there are two or three other large operators, but the great majority of these mills are small with a capacity of from 10,000 to 20,000 feet in ten hours.

Green fir lumber weighs about 3,300 pounds to the 1,000 feet, and therefore an advance of \$1.90 per ton would be equivalent to \$3.13½ per 1,000 feet. The profit in manufacturing lumber in the Willamette Valley during the last seven or eight years has probably ranged from \$1.50 to 2.50 per 1,000. These profits have often been greater and often less, but the above are perhaps the fair average limits. Most operators in this section own their own timber, but stumpage is frequently bought, and has ranged from 25 cents to \$1 per 1,000. In arriving at the above profit stumpage is always charged as a cost of production. The Booth-Kelly Company charges itself for stumpage 50 cents per 1,000, although under the price at which that company bought its land the actual cost would be somewhat less. If the cost of stumpage should be eliminated the profits would be increased by 50 cents per 1,000 feet. It will be seen, therefore, that this advance in the freight rate exceeds by considerable the average profit of manufacture in the Willamette Valley plus the price of stumpage.

This lumber competes with that produced at Portland and shipped from Portland by water to San Francisco. It was not denied that in the past Portland lumber had successfully met lumber from the Willamette Valley in San Francisco upon the former rates of transportation. The rate from the Willamette Valley is now increased by more than the profit in the manufacture of this lumber. There can be but one result—lumber reaching San Francisco by water must supplant that from the Willamette Valley in the San Francisco market.

The rate of \$3.10 was intended to meet the water rate from Portland and applied only at San Francisco and other bay points which could be reached by water. Lumber from Portland to an interior destination must be loaded upon the cars at the water line and transported by rail to the interior point. Lumber from the Willamette Valley to the same interior point was charged the \$3.10 rate to San Francisco plus the local rail rate from San Francisco to destination, thus maintaining the competitive equality between Portland and the Willamette. It will be seen, therefore, that the \$3.10 rate gradually increased as the distance from San Francisco Bay increased, until the \$5 limit was reached. The present rate of \$5 applies to all the territory which could formerly be reached at \$5 and less. Hence the advance to points distant from San Francisco Bay is less than \$1.90 per ton by a gradually diminishing amount until it reaches the old \$5 limit.

It will also be remembered that the Willamette Valley now has an outlet to eastern destinations via Portland. When this original rate was established there could be no movement through the Portland gateway and a rate was made to eastern destinations via Sacramento. The movement to the south over the Siskiyou and after-

wards to the east over the Sierra Nevada was extremely expensive, and when the Southern Pacific and the Union Pacific became united in 1901 joint rates were established for the movement of this lumber through Portland over the Union Pacific lines, where the grades were much easier and the cost of operation much less. These mills therefore reach to-day via Portland the same eastern destinations which they formerly reached via Sacramento. These rates from the Willamette Valley to various eastern points are the same as from Portland, as a rule, and usually the same as from mills in Washington upon the west of the Cascades. Those rates have also been advanced and proceedings are pending before the Commission for a restoration of the original rates, but the questions involved are entirely distinct from this. The defendant apparently concedes that whatever rate is established to eastern points from Portland should also be accorded these Willamette Valley mills.

It follows, therefore, that the effect of this advance is to shut up, as to the Willamette Valley, the San Francisco market, and to limit the market in the vicinity of San Francisco. All other markets are open to these mills to exactly the same degree that they have been in the past. What, then, is the effect of withdrawing that particular market?

The timber cut at these Willamette mills is known as Oregon fir and is very similar to Washington fir except that the trees are smaller. The testimony fairly shows that grade for grade the lumber sells at the same price with Washington fir and with the same readiness. It would seem, however, that the percentage of high-grade lumber runs somewhat less with these mills than in Washington and, still further, that the poorer grades are not as good here as in Washington.

The testimony showed that this poorer lumber could not be shipped to eastern markets and that the only market in which it could be disposed of was San Francisco and points in that immediate vicinity, and this seems probable, for there are few eastern points which can be reached at less than a 40-cent rate, and it fairly appears in this case that there are to-day few if any markets to which No. 2 lumber can be shipped upon a rate as high as that. As was very truly said by counsel for the defense in the argument of the Eastern Rate cases, the common board is everywhere, and the Pacific coast manufacturer can not expect to send to the east this grade of his product. These lower grades must be disposed of in comparatively nearby markets. Mills upon the coast can market this lumber by water; interior mills in Washington seem to find a considerable local market, and the same is true of Portland, but these operations in the Willamette Valley have no local market of any account and have relied in the past upon the San Francisco market for the disposing of this part of their output. To deprive them of this market or to require them to take \$3.13 per 1,000 feet less for this part of their product, which is a considerable percentage of the whole, would turn a profitable into an unprofitable business.

It appears probable, too, that the effect of withdrawing this

market will be more serious upon the small mill than upon the two or three large operators who are affected by these rates. In order to ship lumber long distances it must frequently be dressed and kiln-dried. The larger mills have facilities for doing this, but the smaller operations are without such facilities; nor can they afford to provide them. They must sell their lumber in the rough and they do sell a very considerable portion of it in this market.

It appeared from figures furnished by the defendants that during the year 1907, 7,108 cars of lumber moved from the Willamette Valley via Portland and that 5,436 cars of commercial lumber moved south through Ashland. There was a further movement through Ashland of 3,326 cars of company lumber. The relative movement south was much less during this year than at any previous period, for the reason that the defendants were unable to furnish cars for the transportation of lumber in that direction. Of the cars moving south about one-half were to San Francisco and other bay points and a large proportion of the remainder were to points affected by the advance; although it should be remembered that a portion of this southern movement was dry lumber to which the \$5 rate only applied. Mr. Booth testified that about 20 per cent of this lumber moved south under the \$3.10 rate and that the permanent withdrawal of this rate would practically shut down the operations of his company.

We can hardly agree to the claim of the complainants that a maintenance of the advanced rate would generally and permanently close these mills in the Willamette Valley. It would, in our opinion, very greatly diminish the profits otherwise obtainable from a prosecution of that business. It would limit the operations of these larger companies and would probably drive out of business for the time being many of the smaller ones. This locality is not to-day dependent upon the San Francisco market to the same extent that it was in 1898, for other markets have been developed; but that is still the only available market for any considerable quantity of the lower grades of lumber and without a market for those grades the business in this valley can not be successfully prosecuted. In time, as cost of stumpage to the Portland mill and the Puget Sound mill advances the manufacturer in the Willamette Valley will derive from the lower price of his logs an advantage which will enable him to compete in these markets upon the higher rate, but some years must elapse before that condition will be reached. Meanwhile the operator who *was* invested his money must suffer.

For the last ten years lumber operations upon the Pacific coast have been wonderfully profitable, and these extraordinary profits have led to an abnormal development of the business. What is true of the whole coast is true of the Willamette Valley, but in a somewhat less degree. The timber here is smaller, the expense of getting it to the mill somewhat more, the cost of manufacturing it at the mill somewhat greater, the quality of the lumber itself when manufactured somewhat poorer, or, rather, the percentage of lower grade lumber somewhat higher, all of which has put the operator in

this section at a disadvantage over his competitor at Portland and in Washington. To withdraw this rate adds to that disadvantage.

The distance from Portland to San Francisco is about 750 miles. This rate of \$3.10 applied from the mills just south of Portland as a blanket rate over about 250 miles up the Willamette Valley, the average distance over which lumber moved upon it being perhaps 625 miles. Upon this assumption the rate would yield about 5 mills per ton-mile.

All this lumber in reaching San Francisco must be hauled over the Siskiyou Mountains, where grades are extremely heavy and the cost of operation unusually high. Taking the whole 750 miles the grade does not exceed one-half of 1 per cent for 500 miles, and operating conditions over this portion of the line are favorable; but for about 250 miles grades and curvature are severe. The steepest grade is found just after leaving Ashland for the south, where for 36 miles the heaviest engine can only haul 375 gross tons. Over the entire 250 miles 500 tons would be an average load for such a locomotive.

In practical operation it seems to be customary to make up trains at Ashland of from 20 to 25 cars and to send these trains over the mountains solid. Such a train requires for the first 36 miles out of Ashland three of these most powerful engines, but for the balance of the way can be handled by two. The fuel used is oil, which costs, reduced to the price of coal \$2.80 per ton.

Mills in the Willamette Valley are not situated near the river and are not therefore as a rule upon the main line of the defendants, but are reached by short branch lines of different lengths. The service of collecting this lumber and putting it into the trains of the defendant upon its main line is therefore a somewhat expensive one.

The present rate of \$5 per ton is equivalent to 25 cents per 100 pounds, and the defendants insist that this rate, tested by a comparison with lumber rates in different parts of the United States, taking into account the operating conditions which obtain here, can not be regarded as extravagant.

Comparisons with other lumber rates are not conclusive nor greatly profitable, since operating conditions are seldom the same, much less, traffic and commercial conditions. The old rate of \$3.10 paid, as above stated, an average return of about 5 mills per ton-mile. There are many instances within the knowledge of the Commission where lumber has been and is now being transported for a less charge than this. The \$3.10 rate was certainly a low one, but we are satisfied that it did yield when established, has ever since yielded, and would for the future yield a substantial return over and above the cost of operation and that its maintenance in the past has contributed much to the prosperity of the defendants.

In 1898 no lumber moved from the Willamette Valley. In 1907 the defendants handled from these mills more than 12,000 carloads of revenue-paying lumber. This development of the lumber industry has not only directly contributed a large amount of traffic but has developed the entire country, and has thus added indirectly as much

or perhaps even more to the net profits of the defendants. It is not susceptible of doubt that this development would not have taken place at the time it did but for the putting in of the \$3.10 rate, as previously stated.

The railroad from the southern line of Oregon north is owned by the Oregon & California Railroad Company, but these lines have been operated since before 1898 under lease by the Southern Pacific Company, which now also owns the capital stock of the Oregon & California Company.

The Southern Pacific Company in its returns to this Commission does not state separately the result of operations upon the lines of the Oregon & California Company, and we have nothing in this case from which we can make a critical examination of the results of those operations through a series of years. It does appear that in the year 1897 the gross earnings from operation upon these lines were \$1,436,037 and operating expenses \$1,112,835, leaving net earnings of \$323,202, and that the same figures for 1907 were, gross earnings \$6,417,153, operating expenses \$4,766,350, net earnings \$1,650,803. The mileage in 1897 was 654 miles, in 1907 665 miles, of which about 300 miles are main line and the balance branches.

It appears, therefore, that net earnings in 1907 were more than gross earnings had been ten years before and that present net earnings are about \$2,500 per mile. When it is remembered that more than half of this mileage consists of branch lines, not expensive to construct, it would appear that the above returns are fairly compensatory.

The above figures abundantly confirm the judgment of Mr. Huntington that a rate should be made which would develop the lumber industry of this region, and in our opinion the maintenance of this \$3.10 rate would be also for the advantage of the defendants in the immediate future. These mills are established and they will continue to do business upon a margin of profit much smaller than would have been sufficient to induce their construction in the beginning. But it has been seen that their only market for poorer grades of common lumber is to the south and that without a market for this class of lumber they can not successfully compete with other mills upon the Pacific coast.

As already suggested, when the price of stumpage has sufficiently increased in other sections, this lumber in the Willamette Valley can be manufactured at a profit upon the \$5 rate, but for the present it seems highly probable that the continuance of the lower rate is necessary to a continuance of the business itself in anything like its present volume.

Upon these facts, what conclusion should be reached as to the justice of the advance of April 18, 1907, and as to the lawfulness of the present rate? The defendants insist that the present rate is a reasonable one and that the defendant companies are under no obligation to maintain a rate which is unreasonable low for the future because they have voluntarily done so in the past. The complainants insist that the present rate is unreasonable. They say that the old rate paid the defendants a handsome profit over the cost of

operation; that under it and largely by reason of it the present prosperity of these defendants has come, and that, this being so, it would be most unjust to allow them to advance it, in view of the circumstances under which it was established and has been maintained in the past. The complainants earnestly insist that we may and should look into the past history of this rate in disposing of this question.

It is not claimed that the defendants were under contract with any one shipper, nor with the general body of shippers in that region to maintain the \$3.10 rate. It is doubtful if such a contract would be valid, and at any rate no such contract was ever made. While the defendants announce that they would establish a rate of \$3.10 they never stated that they would maintain this rate in effect for any given length of time. What happened was this:

It was well understood that this lumber could not be manufactured and would not be manufactured unless a rate was established from these mills to San Francisco, which was fairly equivalent to the water rate from Portland and Puget Sound points to that same market. This being so, the Southern Pacific Company had possibly two courses open to it. It might continue in effect its 25-cent rate until such time as with the depletion of forests elsewhere this timber in the Willamette Valley could be profitably marketed upon that rate. Such a course would deprive that company of immediate traffic, but would in the end give to it a much larger measure of profit from the handling of the traffic. It might, in the second place, establish the low rate and develop the industry at once in competition with mills at other points upon the Pacific coast. It elected to adopt the latter policy. It so announced to the public and to individuals who were contemplating the construction of mills in this section. It inaugurated that policy by the putting in of the rate itself. Having maintained that rate for five years, it withdrew it, but upon further consideration announced once more that it would adhere to its former policy and would restore the rate, which it did.

Upon the strength of this action these mills in the Willamette Valley have been established; they would never have been established without it; they can not profitably exist to-day without it. The expense of handling traffic under this rate is not greater than the revenue, thereby occasioning a loss which must be made up upon other business. Such a rate would present an entirely different question from that before us. Here the business is remunerative directly, beside being highly beneficial to the defendants indirectly.

In a recent communication to this Commission touching advances in freight rates, an eminent railroad authority stated that it was the universal opinion of traffic men that rates ought not to be advanced pending unfilled contracts. This is manifestly for the reason that the business public are entitled to depend, within reasonable bounds, upon the continuance of rates which have been voluntarily established.

Such has been the view of this Commission in the past. In *Bates v. Pennsylvania R. R. Co.*, 3 I. C. C. Rep., 435, the complainant was a manufacturer of corn products at Indianapolis, where he had constructed and was operating an extensive plant. For many years rates

upon corn and corn products had been the same from his mill to eastern points of consumption, but the defendant company reduced the rate upon corn $4\frac{1}{2}$ cents without any corresponding reduction upon the product. It was the contention of the complainant that this change in the relation between the rate upon the raw material and the manufactured article would destroy the business which he had built up. The Commission pronounced against the lawfulness of any change in the relation between the rates upon these two commodities largely upon the ground that having once established the relation the carrier was bound to stand by it.

In *Kauffman Milling Co. v. Missouri Pacific Ry. Co. et al.*, 4 I. C. C. Rep., 417, the exact reverse of this proposition was presented. The defendant in that case made a higher rate upon the product than it made upon the raw material from St. Louis and other milling points into Texas. It was claimed that the rate should be the same and that to impose the higher rate upon the manufactured product was a discrimination against the commodity and against complainant as a manufacturer at St. Louis. The Commission pronounced, however, in favor of a differential largely upon the ground that the condition was one which had been long in existence and ought not to be unnecessarily disturbed.

No argument and no citation of authority can, however, add to the naked statement of the fact. Take, for example, the case of Mr. Miles. This gentleman had established a mill upon the strength of the \$3.10 rate, which he was operating in the year 1903. He had also made arrangements for the building of another mill and for the purchase of a large tract of timber. Hearing rumors that this rate was to be withdrawn, he suspended his operations. Subsequently, upon being assured by the officials of the Southern Pacific Company that it would continue its former policy, and relying upon the restoration of the rate itself, he resumed the construction of his mill and completed the purchase of his timber. Is it just and reasonable that within less than three years this company shall be allowed to again reverse its policy and to destroy the value of this man's property? We think not; the tremendous interests involved in the stability of railway rates must not be juggled with in this manner. We do not hold, as a general proposition, that a railroad company having established and maintained a rate is conclusively estopped from advancing that rate, nor that where a rate is put in for a special purpose it may not be taken out when that purpose has been subverted and new conditions have grown up. We apply our decision entirely to the facts in the case before us. Considering all the circumstances, having in mind the just interests of all parties, we conclude that these defendants ought to maintain, for the immediate future at least, substantially the same rate which they have maintained in the past.

It has been seen that this timber in the Willamette Valley must be given a rate to San Francisco which is substantially equivalent to the water rate from Portland. All parties were originally satisfied that the \$3.10 rate substantially met this condition. Water charters from Portland have ranged somewhat higher in the last few years than when this original rate was established; the testi-

mony indicates from 25 to 50 cents per thousand feet. This being so it seems reasonable that this lumber rate should be also somewhat advanced, and we think that for the next two years a rate of 17 cents per 100 pounds, or \$3.40 per ton, might properly be charged.

The second question presented is whether this rate shall also be applied to west side mills above Corvallis, or whether rates from those mills shall be in the future as in the past, 25 cents per ton higher than from mills upon the east bank.

It will be remembered that the main line of the defendants runs from Portland south along the east bank of the Willamette River, but that there is another line with branches extending up the west bank of the river. Connection is made between these lines upon the west and the east at Portland and also by crossing the river from Corvallis to Albany. The road from Corvallis to Albany was formerly an independent line known as the Corvallis & Eastern. Lumber originating upon the west bank for transportation south over the lines of the defendant companies could either be hauled to Portland by the defendants and thence by their own lines south or it could be hauled by the defendant's lines south to Corvallis and thence over the Corvallis & Eastern to a connection with the main line at Albany. The rate charged by the Corvallis & Eastern for this service was 25 cents per ton. The length of the road is about 15 miles, and this would seem to be, under the circumstances, a reasonable charge.

Within a comparatively recent time it appears that the Southern Pacific interests have purchased the stock of the Corvallis & Eastern, so that that road, while still operated in name as an independent proposition, is in reality a part of the defendants' lines. The complainants insist that for this reason the charge of 25 cents should no longer be imposed against the west bank.

The cost to the defendants of handling this lumber from the west side is undoubtedly more, upon the average, than where it originates upon the east side. Rates in the past have always been higher from that section, and in our opinion there is no reason why the same difference may not exist for the future and for the same reason.

The third question arises upon the claim of the interveners that whatever rate is established from mills in the Willamette Valley should be extended to Portland. It has been seen that originally the \$3.10 rate applied to Portland, but that since 1903 this has not been true. During a portion of the time the rate from there to San Francisco has been higher than \$5, but the rate now is \$5 and this has been the ruling rate since August, 1903.

The considerations which induce us to apply this lower rate to mills in the Willamette Valley do not obtain in case of Portland. These manufacturers have the benefit of the water rate and are not therefore dependent at all upon the defendants for reaching the San Francisco market. The low rate was only applied to Portland for a comparatively short time and has not been in force there for the last four years. It is of no special importance to the manufacturer at that point and no injustice is done by withdrawing

it. The distance from Portland is considerably greater than the average distance from Willamette Valley mills, and, on the whole, we think the defendants should be left to their option in meeting or declining to meet water rates at Portland. The claim of the interveners is therefore denied.

We are of the opinion, then, that the present rate of \$5 from all mills in the Willamette Valley, not including Portland, is unjust and unreasonable; that for the future from mills upon the east bank, and upon the west bank south of Corvallis, that rate should not exceed 17 cents per 100 pounds, or \$3.40 per ton, upon rough, green fir lumber and lath, and that from points upon the west bank north of Corvallis it should not exceed \$3.65 per ton. All questions of reparation are reserved for further proceedings.

An order will be issued accordingly.

HARLAN, Commissioner, dissenting:

The \$3.10 rate is conceded to have been a low rate, and I do not understand that the present rate of \$5 is condemned in the opinion of the Commission as unreasonable in itself and apart from the matters of estoppel on which the opinion seems largely to rest. In my judgment we are not warranted, under the act to regulate commerce as amended, in condemning a rate upon such considerations. When preferences and discriminations are not alleged, the test of the lawfulness of a rate is whether as a rate for the service offered it is reasonable or excessive. This is not the test to which the rate complained of in this proceeding has been subjected as I read the opinion. It is not held to be unlawful on the ground that it is an excessive rate, but is reduced rather because of certain supposed equities existing between the complaining shippers and the defendant carriers. Without enlarging upon this view of the matter it will suffice to say that I do not understand that we are authorized to deal with a rate on those grounds.

For these reasons and also because I consider the present rate not to be an unreasonable rate I am constrained to withhold my assent to the disposition made of the complaint.

The Chairman of the Commission authorizes me to say that he joins in this dissent.

Order.

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 1st Day of June, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1331.

WESTERN OREGON LUMBER MANUFACTURERS' ASSOCIATION, Willamette Valley Lumber Company, Falls City Lumber Company, Curtiss Lumber Company, Charles K. Spaulding Logging Company, Booth-Kelly Lumber Company, J. H. Chambers, H. M. Parvin, and Cruzan Brothers, Complainants, and Inman-Poulsen Lumber Company, Oregon & Washington Lumber Company, East Side Mill & Lumber Company, Standard Box and Lumber Company, Jones Lumber Company, and St. Johns Lumber Company, Interveners,

v.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendants, the Southern Pacific Company and the Oregon & California Railroad Company, be, and they are hereby, notified and required to cease and desist, on or before the 15th day of August, 1908, from charging, demanding, collecting, or receiving for the transportation of rough, green fir lumber and lath, in carloads, their present rate of \$5 per ton from points upon the east bank of the Willamette River, in the state of Oregon, and upon the west bank thereof south of Corvallis, Oreg., and upon the west bank of said river north of said Corvallis, to San Francisco, Cal., and bay points.

It is further ordered, That said defendants be, and they are hereby, notified and required to establish and put in force, on or before the said 15th day of August, 1908, and maintain in force thereafter during a period of not less than two years, and apply to the transportation of rough green fir lumber and lath, in carloads, a rate not exceeding \$3.40 per ton from points upon the east bank of said Willamette River and upon the west bank thereof south of said Corvallis, to San Francisco, Cal., and bay points; and a rate not exceeding \$3.65 per ton from points upon the west bank of said river north of said Corvallis, to said San Francisco and bay points, not including in either rate Portland, Oreg., as a point of origin.

And it is further ordered, That said defendants be, and they are hereby, authorized to make effective upon three days' notice to the public and the Interstate Commerce Commission, given in the manner required by law, such rates as it may be necessary for said defendants, or either of them, to establish for the purpose of complying with this order. The schedules containing such rates must bear the notation that said rates are issued under the authority hereby granted, and must refer to the title and number of this case.

Endorsed: Filed January 31, 1910, Southard Hoffman, Clerk,
By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern
District of California. In Equity.

No. 14760.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD
COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Replication.

The Replication of the Above-named Complainants to the Answer
of the Above-named Defendant.

These replicants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto sayeth that they do and will ever maintain and prove their said bill to be true, certain, and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things these replicants are ready to aver, maintain, and prove as this honorable Court shall direct, and humbly as in and by their said bill they have already prayed.

F. C. DILLARD,
W. W. COTTON,
P. F. DUNNE, AND
C. W. DURBROW,

Solicitors for Complainants.

WM. F. HERRIN.

Endorsed: Filed January 31, 1910, Southard Hoffman, Clerk, By
J. A. Schaertzer, Deputy Clerk.

*Mandate of the Supreme Court of the United States.*UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the Northern District of California, Greeting:

[Seal of the Supreme Court of the U. S.]

Whereas, lately in the Circuit Court of the United States for the Northern District of California before you or some of you, in a cause between Southern Pacific Company and Oregon & California Railroad Company, complainants, and The Interstate Commerce Commission, defendant, No. 14,760, wherein the Judges of the said Circuit Court were divided in opinion, as by the inspection of the certificate of the Judges of the said Circuit Court, which was brought into the Supreme Court of the United States agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and nine, the said cause came on to be heard before the said Supreme Court, on the said certificate and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the said certificate be, and the same is hereby, dismissed.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to proceed therein in conformity with law.

December 6, 1909.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said certificate notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of January, in the year of our Lord one thousand nine hundred and ten.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Endorsed: Filed Feb. 7, 1910, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

At a stated term, to wit: the November term A. D. 1909 of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City and County of San Francisco, on Monday the 28th day of February in the year of our Lord one thousand nine hundred and ten.

Present: The Honorable William B. Gilbert, Circuit Judge; the Honorable Erskine M. Ross, Circuit Judge; the Honorable William W. Morrow, Circuit Judge.

No. 14760.

SOUTHERN PACIFIC COMPANY

vs.

INTERSTATE COMMERCE COMMISSION.

Order Dismissing Cause and for Entry of Final Decree.

This cause having been heretofore heard and submitted to the Court for consideration and decision, having been now fully considered, and the Court having filed its written opinion, it is, in accordance with said opinion, ordered that this cause be and the same hereby is dismissed at complainant's costs, and that a decree be signed, filed and entered herein accordingly.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14760.

SOUTHERN PACIFIC COMPANY et al., Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Enrollment.

The Complainants filed their bill of complaint herein on the 25th day of July 1908, which is hereto annexed.

A Subpœna to appear and answer in said cause was thereupon issued, returnable on the 8th day of September A. D. 1908, which is hereto annexed.

On the 3rd day of August 1908, instructions from the Attorney General of the United States were filed herein, which is hereto annexed.

On the 25th day of September 1908, a demurrer was filed herein, which is hereto annexed.

On the 30th day of September 1908, an Order sustaining demurrer was made and entered herein, a copy of which order is hereto annexed.

On the 1st day of October 1908, an Order allowing complainants to file an amended bill was made and entered herein, a copy of said order is hereto annexed.

On the 1st day of October 1908, an Amended Bill of Complaint was filed herein, which is hereto annexed.

On the 1st day of October 1908, a demurrer to the amended bill of complaint was filed herein, which is hereto annexed.

On the 3rd day of October 1908, an Order directing counsel to prepare statement for the purpose of certifying the case to the Supreme Court of the United States etc., was made and entered herein, a copy of which said order is hereto annexed.

On the 31st day of January 1910, an Order allowing defendant to withdraw demurrer and file a demurrer and answer to the amended bill and sustaining demurrer was made and entered herein, a copy of said order is hereto annexed.

On the 31st day of January 1910, a demurrer and answer of defendant and a replication to the answer were filed herein, which are hereto annexed.

On the 7th day of February 1910, the Mandate of the Supreme Court of the United States was filed herein, which is hereto annexed.

On the 28th day of February 1910, an Order dismissing amended bill of complaint and for decree to be filed and entered was made and entered herein a copy of said order is hereto annexed.

Thereafter a final decree was signed, filed and entered herein in the words and figures as follows, to-wit:

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14760.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD
COMPANY

vs.

INTERSTATE COMMERCE COMMISSION.

Final Decree.

This cause having come on to be heard, upon the Amended Bill of Complaint herein, the answer of the defendant thereto, the replication of the complainant to such answer, and the proofs, documentary and written, filed, as per stipulation herein, in said cause, and having been argued by counsel for the respective parties, and thereupon, upon consideration thereof, it is ordered adjudged and decreed that the complainants' said amended Bill of Complaint be, and the same is hereby, dismissed, with costs to the defendant, to be taxed.

Dated, March — 1910.

WM. B. GILBERT,
Circuit Judge.
ERSKINE M. ROSS,
Circuit Judge.
WM. W. MORROW,
Circuit Judge.

Endorsed: Filed and entered Mar. 24, 1910. Southard Hoffman, Clerk, By W. B. Maling, Deputy Clerk.

Certificate to Enrollment.

Whereupon, said pleadings, subpoenas, copies of orders and decree, are hereto annexed; said final decree being duly signed, filed and enrolled, pursuant to the practice of said Circuit Court.

Attest my hand and the seal of said Circuit Court this 24th day of March 1910.

[SEAL.]

SOUTHARD HOFFMAN, *Clerk*,
By J. A. SCHAERTZER, *Deputy Clerk*.

Endorsed: Enrolled Papers, Filed March 24, 1910, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit,
Northern District of California.

SOUTHERN PACIFIC COMPANY et al., Complainants,
vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Before Gilbert, Ross, and Morrow, Circuit Judges.

Ross, Circuit Judge, delivered the opinion of the court.

This suit was brought to enjoin the enforcement of a rate of \$3.40 fixed by the Interstate Commerce Commission on rough green fir lumber and laths carried by the complainant railroad companies from certain points in the Willamette Valley, in Oregon, to San Francisco and adjacent points—the Southern Pacific Company having on the 18th day of April, 1907, advanced its theretofore established rate on such lumber for such haul from \$3.10 to \$5.00 per ton. The pleadings, as changed since the cause was last presented to the court, no longer raise the point, then made, that the rates so fixed were below the cost of transporting the lumber.

It is well established law that the fixing of the rates to be charged by public service corporations is a legislative function, from which it necessarily follows that when Congress, as it did, conferred upon the Interstate Commerce Commission the power, in causes properly brought before it, to determine what are and should be reasonable rates to be charged by the carriers of interstate commerce, its action in the premises is conclusive upon the courts, subject of course always to the inhibitions of the Constitution of the United States, which protect such companies, like everybody else, against confiscatory rates. In the case in hand, the main point relied upon by the counsel for the complainants at the bar was that it appears upon the face of the findings and decision of the Commission itself, that it did not fix the rate of \$3.40 on the lumber in question as a reasonable rate, in and of itself but only as a reasonable rate in view of the conduct of the railroad company, under and by reason of which the complainants established their mills and produced the traffic. We do not so interpret the findings and report of the Commission. It ap-

pears that the rates so fixed by the railroad company as an inducement to the lumbermen of the Willamette Valley to establish mills there for the production of lumber for transportation to San Francisco and other points was \$3.10, which rate was continued for a number of years, and under which numerous mills were established by the lumbermen and a large amount of lumber produced by them and transported by the railroad companies. In respect to that matter, what the case shows is thus briefly stated by the Interstate Commerce Commission:

"Previous to 1898 no lumber was cut in that valley except such as was necessary to supply the local consumption. The ocean could only be reached at Portland upon the north after a rail haul of considerable length and upon a comparatively high rate, so that lumber cut in the Willamette Valley could not find a market by water in competition with that produced in Portland. The rate to the south was so high as to prohibit shipments in that direction in competition with water carriage from Portland. About 1898 the Southern Pacific Company became convinced that it ought to adopt a policy which would develop the lumber industry along its lines in the Willamette Valley. At that time it had no affiliation with the Union Pacific Railroad or its allied lines and therefore could obtain no outlet for this lumber through the Portland gateway. Since both the Oregon Railroad & Navigation Company and the Northern Pacific Company had extensive lumber interests of their own which they were bound to protect, the only possible market was to the south and to points in the east reached via the south.

"For several years rates had been in effect from Puget Sound territory and from Portland to Utah, Colorado, and other eastern destinations. In order that lumber produced in the Willamette Valley might be given a market in competition with Washington and Portland mills in this territory it must go south to Sacramento and east over the lines of the Southern Pacific. There was also an extensive market in San Francisco and adjacent territory. This market could be reached from Portland and from points upon Puget Sound by water, and lumber arriving at San Francisco by water could there be loaded upon the cars and shipped by rail to nearby interior points and to the eastern points above mentioned. In order, therefore, to give this lumber of the Willamette Valley a market it was absolutely essential to establish a rate from that territory to San Francisco which was fairly equivalent to the water rate from Portland and from corresponding points. This was perfectly understood by all parties and the determination of the Southern Pacific was to do precisely this thing.

"What actually occurred in that valley can be best shown by considering the history of the operations of the Booth-Kelly Company, which was the first operator in the field and which is today the largest producer of lumber in that region. In 1897 Mr. Booth was running a mill in the southern part of Oregon for the cutting of pine, which is used mainly for sash and doors and cabinet purposes. An opportunity presented itself to lease a mill which had just been constructed for the manufacture of fir, and the Southern Pacific Company ap-

plied to him stating that a determination had been reached to make this lower rate and asking him to lease this mill. At that time the merchantability of Oregon fir in competition with Puget Sound fir and other lumber had not been demonstrated, but Mr. Booth, believing that the experiment was worth trying, leased this mill for a year and the railroad company put in a rate of \$3.10 per ton.

"An actual test showed Mr. Booth that this lumber would sell in competition with other fir in the San Francisco market and also convinced him that he could profitably manufacture upon the rate proposed. He therefore entered into negotiations with the Southern Pacific Company for the purchase of a tract of timber land embracing about 17,000 acres. In order to reach this land, it was necessary to construct a railroad some 20 miles in length, which the Southern Pacific undertook to do upon condition that Mr. Booth should ship over the road, for the first year a certain number of carloads of lumber, that he should pay an arbitrary rate of so much per ton over this branch road, and that he should take off the lumber from the tract in question within a given time.

"Mr. Booth testified—and there can be no doubt of the fact—that previous to the making of this contract and as the basis of all his operations it was understood between him and the railroad company that a rate to San Francisco should be put in and maintained which was fairly equivalent to the water rate from Portland and that he should also be given a rate via Sacramento to various eastern points in Idaho, Utah, and Colorado. In accordance with this understanding the Southern Pacific established in 1899 a rate of \$3.10 per ton upon lumber to San Francisco and bay points. This original rate applied to all kinds of lumber both green and dry. At first it was only applicable to the section in which the Booth mills were located, but was very soon extended to the entire Willamette Valley, including Portland.

"Under the stimulus of this rate the lumber business in the Willamette Valley rapidly developed. The Booth-Kelly Company extended its own operations, and many other mills sprang up, until, in 1904, that industry had reached very considerable proportions.

"In the latter part of 1903 the \$3.10 rate was withdrawn from Portland, and in January, 1904, it was withdrawn from the entire Willamette Valley, a rate of \$5 being established instead. The testimony in this case shows that the effect of the putting in of the \$5 rate was, or would have been if continued, to practically suspend the operations of these mills. They made this representation with great earnestness to the Southern Pacific Company, and finally the leading officials of that company, among others its chief traffic director, visited the scene of these operations. As a result of this personal inspection and after further consideration that company announced that while the rate never ought to have been made at the outset, inasmuch as it had been, that company would continue it for the future, but would limit it to rough lumber shipped green. Acting upon this announcement, the Southern Pacific Company did, in May, 1904, make effective once again this rate of \$3.10, which was now,

however, applied not to all lumber, but only to rough green fir lumber and lath-.

"As showing the importance which lumber manufacturers in this region attached to the \$3.10 rate, what occurred at the time this rate was withdrawn in 1904 in a particular instance may be mentioned. A certain operator who owned one mill already had arranged, in the year 1903, to purchase a considerable quantity of timber and to erect a large mill. When rumors of the withdrawal of the \$3.10 rate became rife he suspended his negotiations, but after the rate was reestablished in 1904, believing from what the officials of the Southern Pacific had said to him that this company had now finally determined upon the maintenance of this rate as a permanent policy, he purchased his land and resumed the building of his mill, and has since constructed still another mill and purchased some 800,000,000 feet of timber.

"There can be no question but what the existence of this industry in anything like its present proportions in the Willamette Valley is almost entirely due to the establishment of this \$3.10 rate. Without it the mills would not have been built nor the timber which these operators own purchased, nor could the business have been profitably conducted during recent years upon the present rate of \$5 per ton. The complainants insist that a maintenance of the present rate will shut up their mills and very largely depreciate their timber investments.

"There are some 250 mills in the Willamette Valley, not including Portland, with a capacity of perhaps 1,300,000,000 feet per annum, although the actual cut of these mills has never exceeded in any one year 1,000,000,000 feet, of which about two-thirds is shipped out by rail over the lines of the defendants, the balance being consumed locally. A considerable part of this so-called local consumption is purchased by the railroad itself for its own use. The Booth-Kelly Company manufacture nearly one-seventh of the entire output of the valley and there are two or three other large operators, but the great majority of these mills are small with a capacity of from 10,000 to 20,000 feet in ten hours.

"Green fir lumber weighs about 3,300 pounds to the 1,000 feet, and therefore an advance of \$1.90 per ton would be equivalent to \$3.13½ per 1,000 feet. The profit in manufacturing lumber in the Willamette Valley during the last seven or eight years has probably ranged from \$1.50 to \$2.50 per 1,000. These profits have often been greater and often less, but the above are perhaps the fair average limits. Most operators in this section own their own timber, but stumpage is frequently bought, and has ranged from 25 cents to \$1 per 1,000. In arriving at the above profit stumpage is always charged as a cost of production. The Booth-Kelly Company charges itself for stumpage 50 cents per 1,000, although under the price at which that company bought its land the actual cost would be somewhat less. If the cost of stumpage should be eliminated the profits would be increased by 50 cents per 1,000 feet. It will be seen, therefore, that this advance in the freight rate exceeds by considerable the aver-

age profit of manufacture in the Willamette Valley plus the price of stumpage.

"This lumber competes with that produced at Portland and shipped from Portland by water to San Francisco. It was not denied that in the past Portland lumber had successfully met lumber from the Willamette Valley in San Francisco upon the former rates of transportation. The rate from the Willamette Valley is now increased by more than the profit in the manufacture of this lumber. There can be but one result—lumber reaching San Francisco by water must supplant that from the Willamette Valley in the San Francisco market.

"The rate of \$3.10 was intended to meet the water rate from Portland and applied only at San Francisco and other bay points which could be reached by water. Lumber from Portland to an interior destination must be loaded upon the cars at the water line and transported by rail to the interior point. Lumber from the Willamette Valley to the same interior point was charged the \$3.10 rate to San Francisco plus the local rail rate from San Francisco to destination, thus maintaining the competitive equality between Portland and the Willamette. It will be seen, therefore, that the 3.10 rate gradually increased as the distance from San Francisco Bay increased, until the \$5 limit was reached. The present rate of \$5 applies to all the territory which could formerly be reached at \$5 and less. Hence the advance to points distant from San Francisco Bay is less than \$1.90 per ton by a gradually diminishing amount until it reaches the old \$5 limit.

"It will also be remembered that the Willamette Valley now has an outlet to eastern destinations via Portland. When this original rate was established there could be no movement through the Portland Gateway and a rate was made to eastern destinations via Sacramento. The movement to the south over the Siskiyou and afterwards to the east over the Sierra Nevada was extremely expensive, and when the Southern Pacific and the Union Pacific became united in 1901 joint rates were established for the movement of this lumber through Portland over the Union Pacific lines, where the grades were much easier and the cost of operation much less. These mills therefore reach today via Portland the same eastern destinations which they formerly reached via Sacramento. These rates from the Willamette Valley to various eastern points are the same as from Portland, as a rule, and usually the same as from mills in Washington upon the west of the Cascades. Those rates have also been advanced and proceedings are pending before the Commission for a restoration of the original rates, but the questions involved are entirely distinct from this. The defendant apparently concedes that whatever rate is established to eastern points from Portland should also be conceded these Willamette Valley mills.

"It follows, therefore, that the effect of this advance is to shut up, as to the Willamette Valley, the San Francisco market, and to limit the market in the vicinity of San Francisco. All other markets are open to these mills to exactly the same degree that

they have been in the past. What, then, is the effect of withdrawing that particular market?

"The timber cut at these Willamette mills is known as Oregon fir and is very similar to Washington fir except that the trees are smaller. The testimony fairly shows that grade for grade the lumber sells at the same price with Washington fir and with the same readiness. It would seem, however, that the percentage of high-grade lumber runs somewhat less with these mills than in Washington and, still further, that the poorer grades are not as good here as in Washington.

"The testimony showed that this poorer lumber could not be shipped to eastern markets and that the only market in which it could be disposed of was San Francisco and points in that immediate vicinity, and this seems probable, for there are few eastern points which can be reached at less than a 40-cent rate, and it fairly appears in this case that there are today few if any markets to which No. 2 lumber can be shipped upon a rate as high as that. As was very truly said by counsel for the defense in the argument of the Eastern Rate cases, the common board is everywhere, and the Pacific coast manufacturer can not expect to send to the east this grade of his product. These lower grades must be disposed of in comparatively nearby markets. Mills upon the coast can market this lumber by water; interior mills in Washington seem to find a considerable local market, and the same is true of Portland, but these operations in the Willamette Valley have no local market of any account and have relied in the past upon the San Francisco market for the disposing of this part of their output. To deprive them of this market or to require them to take \$3.13 per 1,000 feet less for this part of their product, which is considerable percentage of the whole, would turn a profitable into an unprofitable business.

"It appears probable, too, that the effect of withdrawing this market will be more serious upon the small mill than upon the two or three large operators who are affected by these rates. In order to ship lumber long distances it must frequently be dressed and kiln-dried. The larger mills have facilities for doing this, but the smaller operations are without such facilities; nor can they afford to provide them. They must sell their lumber in the rough and they do sell a very considerable portion of it in this market.

"It appeared from figures furnished by the defendants that during the year 1907, 7,108 cars of lumber moved from the Willamette Valley via Portland and that 5,436 cars of commercial lumber moved south through Ashland. There was a further movement through Ashland of 3,326 cars of company lumber. The relative movement south was much less during this year than at any previous period for the reason that the defendants were unable to furnish cars for the transportation of lumber in that direction. Of the cars moving south about one-half were to San Francisco and other bay points and a large proportion of the remainder were to points affected by the advance; although it should be remembered

that a portion of this southern movement was dry lumber to which the \$5 rate only applied. Mr. Booth testified that about 20 per cent of this lumber moved south under the \$3.10 rate and that the permanent withdrawal of this rate would practically shut down the operations of his company."

While it will be seen from the foregoing quotation from the report of the Commission that that body took into consideration the conduct of the railroad company under which the lumbermen undertook and developed the lumber industry in the Willamette Valley, the Commission, in fixing as it did the rate of \$3.40 on rough green fir lumber and laths for the haul in question, by no means limited the basis of its decision to the past action of the railroad companies, as will be seen from this further quotation from its findings and decision:

"The distance from Portland to San Francisco is about 750 miles. This rate of \$3.10 applied from mills just south of Portland as a blanket rate over about 250 miles up the Willamette Valley, the average distance over which lumber moved upon it being perhaps 625 miles. Upon this assumption the rate would yield about 5 mills per ton-mile.

"All this lumber in reaching San Francisco must be hauled over the Siskiyou Mountains, where grades are extremely heavy and the cost of operation unusually high. Taking the whole 750 miles the grade does not exceed one-half of 1 per cent for 500 miles, and operating conditions over this portion of the line are favorable; but for about 250 miles grades and curvatures are severe. The steepest grade is found just after leaving Ashland for the south, where for 36 miles the heaviest engine can only haul 375 gross tons. Over the entire 250 miles 500 tons would be an average load for such a locomotive.

"In practical operation it seems to be customary to make up trains at Ashland of from 20 to 25 cars and to send these trains over the mountains solid. Such a train requires for the first 36 miles out of Ashland three of these most powerful engines, but for the balance of the way can be handled by two. The fuel used is oil, which costs, reduced to the price of coal, \$2.80 per ton.

"Mills in the Willamette Valley are not situated near the river and are not therefore as a rule upon the main line of the defendants, but are reached by short branch lines of different lengths. The service of collecting this lumber and putting it into the trains of the defendant upon its main line is therefore a somewhat expensive one.

"The present rate of \$5 per ton is equivalent to 25 cents per 100 pounds, and the defendants insist that this rate, tested by a comparison with lumber rates in different parts of the United States, taking into account the operating conditions which obtain here, can not be regarded as extravagant.

"Comparisons with other lumber rates are not conclusive nor greatly profitable, since operating conditions are seldom the same, much less, traffic and commercial conditions. The old rate of

\$3.10 paid, as above stated, an average return of about 5 mills per ton-mile. There are many instances within the knowledge of the Commission where lumber has been and is now being transported for a less charge than this. The \$3.10 rate was certainly a low one, but we are satisfied that it did yield when established, has ever since yielded, and would for the future yield a substantial return over and above the cost of operation and that its maintenance in the past has contributed much to the prosperity of the defendants.

"In 1898 no lumber moved from the Willamette Valley. In 1907 the defendants handled from these mills more than 12,000 carloads of revenue-paying lumber. This development of the lumber industry has not only directly contributed a large amount of traffic but has developed the entire country, and has thus added indirectly as much or perhaps even more to the net profits of the defendants. It is not susceptible of doubt that this development would not have taken place at the time it did but for the putting in of the \$3.10 rate, as previously stated.

"The railroad from the southern line of Oregon north is owned by the Oregon & California Railroad Company, but these lines have been operated since before 1898 under lease by the Southern Pacific Company, which now also owns the capital stock of the Oregon & California Company.

"The Southern Pacific Company in its returns to this Commission does not state separately the result of operations upon the lines of the Oregon & California Company, and we have nothing in this case from which we can make a critical examination of the results of those operations through a series of years. It does appear that in the year 1907 the gross earnings from operation upon these lines were \$1,436,037, and operating expenses \$1,112,835, leaving net earnings of \$323,202, and that the same figures for 1907, were, gross earnings \$6,417,153, operating expenses \$4,766,350, net earnings \$1,650,803. The mileage in 1897 was 654 miles, in 1907 665 miles, of which about 300 miles are main line and the balance branches.

"It appears, therefore, that net earnings in 1907 were more than gross earnings had been ten years before and that present net earnings are about \$2,500 per mile. When it is remembered that more than half of this mileage consists of branch lines, not expensive to construct, it would appear that the above returns are fairly compensatory.

"The above figures abundantly confirm the judgment of Mr. Huntington that a rate should be made which would develop the lumber industry of this region, and in our opinion the maintenance of this \$3.10 rate would be also for the advantage of the defendants in the immediate future. These mills are established and they will continue to do business upon a margin of profit much smaller than would have been sufficient to induce their construction in the beginning. But it has been seen that their only market for poorer grades of common lumber is to the south, and that without a market for this class of lumber they cannot successfully compete with other mills upon the Pacific Coast.

"As already suggested, when the price of stumpage has sufficiently increased in other sections, this lumber in the Willamette Valley can be manufactured at a profit upon the \$5 rate, but for the present it seems highly probable that the continuance of the lower rate is necessary to a continuance of the business itself in anything like its present volume."

It will be seen from the last quotation from the findings of the Commission, and from other parts of it, that it expressly found that the old rate of \$3.10 established by the railroad company paid an average return to it of about 5 mills per ton-mile, and that while that rate was a low one "it did yield when established, has ever since yielded, and would for the future yield, a substantial return over and above the cost of operation." In view of that finding, we cannot say that its increased rate to \$3.40 a ton is so unreasonable as to come within any inhibition of the Constitution of the United States. The jurisdiction which is invoked here ought, as was said by the Supreme Court of the United States in a recent and analogous case, to be exercised only in the clearest cases. The case referred to is a water rate case, *Knoxville v. Water Company*, 212 U. S. 1, where the court said, among other things:

"If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States. In *Ex parte Young*, 209 U. S. 123, the last word of caution by this court was said (p. 166): 'Finally it is objected that the necessary result of upholding this suit in the Circuit Court will be to draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the State, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts.' The same thought, in effect, was expressed in *San Diego Land & Town Company v. National City*, 174 U. S. 739, 754, 'judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.' And in *San Diego Land & Town Company v. Jasper*, 189 U. S. 439, after repeating with approval this language, it was said (p. 441): 'In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached.'"

And the Supreme Court, in *Knoxville v. Water Company*, concluded its opinion in these timely and appropriate words:

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies, to whom the legislative power has been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property, and that State or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence. On the other hand, the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based."

The conclusion to which we have come in the case before us is that the complaint should be dismissed at the complainants' cost. It is so ordered.

Endorsed: Filed Feb. 28, 1910. Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

In Equity. No. 14760.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Stipulation.

This case being at issue upon amended bill of complaint, answer, and replication, subject to the objection of defendant that no evidence is admissible under the issues so made and to the overruling of such objection, the case may be submitted on the report and order of the Interstate Commerce Commission and the record made before them herein filed. It is agreed that the Commission in deciding this case considered the evidence introduced in cases Nos. 1054, 1327, 1329, 1348, and 1335 (Commission's docket) styled respectively, Pacific Coast Lumber Manufacturers' Association, et al. v.

Northern Pacific Railway Company, et al., Oregon & Washington Lumber Manufacturers' Association, et al. v. Union Pacific Railroad Company, et al., Pacific Coast Lumber Manufacturers' Association, et al., v. Northern Pacific Railway Company, et al., Potlatch Lumber Company, et al., v. Northern Pacific Railway Company, et al., Southwest Washington Lumber Manufacturers' Association v. Northern Pacific Railway Company, et al., and also the reports and tariffs required by law to be filed with the Interstate Commerce Commission and such matters as were in their official cognizance as such Commission and also the various annual reports made by the officers of the railway companies in said several cases to their stockholders; and there was read from said documents and matters of record, above referred to after the words, "It is agreed that the Commission," the part thereof hereto attached, marked "Exhibit A and B," which is agreed to be all of said documentary or record evidence material to the issues in this case and is made part of the evidence and record herein.

SOUTHERN PACIFIC COMPANY AND
OREGON & CALIFORNIA RAILROAD
COMPANY,

By W. W. COTTON,
C. W. DURBROW,
F. C. DILLARD, *Their Solicitors.*

INTERSTATE COMMERCE COMMISSION,

By ROB'T T. DEVLIN,
LUTHER M. WALTER,
J. N. TEAL, *Its Solicitors.*

San Francisco, Calif., January 31, 1910.

EXHIBIT A, FILED BY DEFENDANT, BEING STATEMENT FROM
REPORTS TO STOCKHOLDERS OF COMPLAINANT COMPANY, TARIFFS
AND EXHIBITS:

Oregon & California Railroad.

Earnings and Expenses Statistics, Years Ending June 30.

	1908.	1909.
Mileage, Main Track	665.68	666.07
Total Earnings	\$6,918,414.76	\$7,104,081.23
Total Operating Revenue.....	6,814,015.95	6,998,949.57
Total Passenger Earnings.....	3,130,094.22	3,113,239.19
Total Freight Earnings.....	3,330,819.58	3,490,042.58
Total Expenditures	5,968,600.60	5,839,698.01
Total Expenditures for Operation..	4,131,713.80	3,763,470.84
Surplus for year	949,813.76	1,264,383.22

Statement Gross Earnings, Operating Expenses, Net Earnings, and
Mileage for Years Ending June 30, 1897, 1906 and 1907 of the
Oregon & California Railroad Company.

Table 1.

Year.	Gross earnings.	Operating expenses.	Net earnings.	Mileage.
1897....	\$1,436,037	\$1,112,835	\$313,201	654.04
1906....	5,885,183	4,574,185	1,310,998	664.24
1907....	6,416,153	4,766,350	1,650,803	665.89

Statement of Total Amount Paid for Maintenance of Way and per
Mile of Road and Total Amount for Maintenance of Equipment
and per Mile of Road for the Oregon & California Railroad Com-
pany for the Year- 1905, 1906, and 1907.

Table 2.

	Main. of way.	Per mile.	Main. of equip.	Per mile.
1905.....	\$1,692,093	\$2525	\$488,609	\$729
1906.....	*1,698,887	2567	**602,219	906
1907.....	1,374,413	2064	698,670	1049

* Includes reserve for future maintenance and renewals, \$294,882.

** Includes reserve for future maintenance and renewals \$1016.

Southern Pacific Company and its Proprietary Companies.

Traffic and Operating Statistics.

From Reports to Stockholders.

	1900.	1906.	1907.
Mileage operated	7,545.17	9,191.56	9,400.59
Gross earnings	\$63,920,414.40	\$105,632,550.00	\$124,942,797
Total operating expenses rail and water	41,408,800.00	68,120,893.00	80,220,800
Percentage of operating expense, rail and water	64.78	64.49	64.21
Total earnings, rail only		63.31	61.52
Net Earnings	22,511,614.00	37,511,656.42	44,721,997.57
Average train load	295.30	383.07	379.80
Av. tons freight per loaded car	17	19.78	19.78
Av. distance of haul of one ton	307.51	262.31	267.67
Av. receipts per ton per mile .....	.957	1.025	1.097
Freight earnings per mile of road	5,296.97	6,734.36	7,893.68
Earnings per freight train mile	2.51	3.29	3.53
Tons carried one mile per mile of road	621,424	784,590	840,424

	1900.	1906.	1907.
Pct. of empty car- in train.....	27.04	28.47	27.40
Products of forests—tons, 2,252,676—14.77%		4,571,191—20.36%	
4,703,810—19.44%.			

Capitalization.

The Southern Pacific Company owns the entire capital stock of the Southern Pacific and the numerous roads all grouped together as the Proprietary Companies:

The capitalization of the consolidated system on June 30, 1906, stood as follows:

Common stock	\$197,849,258
Preferred stock	39,569,840
Total stock	\$237,419,098
Funded debt (net)	354,737,321
	<hr/>
	\$527,156,419

Increase of Capitalization.

Year.	Common stock.	Preferred stock.	Funded debt (net).	Total capital.	Gross earnings (rail lines).
1900.....	\$197,832,148	.....	\$305,376,417	\$503,408,655	\$65,279,622
1906.....	197,849,258	\$39,569,840	354,737,321	592,156,419	99,123,549

"Increase over six years: Total capital, 18 per cent; gross earnings, 50 per cent.

"In 1907 the amount of preferred stock was increased to \$75,569,840 through the issue of about \$36,000,000 new stock."

Financial Statistics.

	From reports to stockholders.	
	1906.	1907.
Mileage operated	7,545.17	9,191.56
Gross earnings	\$63,920,414.00	\$105,632,549.00
Net earnings	22,511,614.00	37,511,656.00
Earnings per mile of road	8,106.66	10,784.42
Operating expenses to earning, rail water	64.78	64.49
Dividends paid—		
Common stock		5%
Preferred stock		7%
Net surplus for year	7,253,420.00	11,118,837.00
Total surplus, cr. P. & L.	43,731,797.00	82,665,869.00
		14,408,585
		99,112,395

The following statement taken from the annual report to stockholders June 30, 1906, page 21, will be of interest:

"The receipts for the year were the largest in the history of the company since it commenced operations in the year 1885. The development of the country served by its lines and the services given by them to the public are shown in the following statement:"

Year ended—	Miles of road operated.	Gross transporta- tion receipts.	Operating expenses.	Receipts over operating expenses.	Passengers carried 1 mile.	Tons revenue freight carried 1 mile.
June 30, 1906...	9,216.83	\$105,632,549.52	68,120,893.10	37,511,656.42	1,397,411,783	6,236,597,303
Dec. 31, 1885...	4,705.43	30,351,772.14	15,184,077.92	15,167,694.22	318,088,758	868,409,660
Increase	4,511.40	75,280,777.38	52,936,815.18	22,343,962.20	1,079,323,025	5,368,187,643
Per cent.	95.88	248.03	348.63	147.31	339.31	618.16

"The transportation receipts increased \$10,117,391.51. Operating expenses increased \$4,456,658.00. After the payment of operating expenses and taxes, there remained a surplus of \$38,372,032.31. The requirements for interest on funded debt, for sinking funds, and for other miscellaneous charges, were \$19,179,384.97, leaving a surplus of \$19,192,647.34, substantially one-half, for dividends on the shares of the company and for other appropriations. The Board of Directors therefore decided to declare a semi-annual dividend of two and one-half per cent, payable October 1, 1906."

Expenditures Included in Operating Expenses on Account Maintenance of Way and Equipment. Period Covered, Years Ending June 30, 1910, to June 30, 1906.

	Maintenance of way.	Maintenance of equipment.
1900.....	\$8,261,027.00	\$6,571,757.00
1901.....	10,174,319.00	7,643,913.00
1902.....	12,093,242.00	9,128,251.00
1903.....	13,064,454.00	10,803,788.00
1904.....	12,315,561.00	12,050,081.00
1905.....	13,731,801.00	12,989,732.00
1906.....	*16,319,683.00	*14,286,110.00
	<hr/> \$85,960,087.00	<hr/> \$73,473,632.00

* Operating expenses rail and water lines for 1906 include a charge of \$2,117,286 reserve for maintenance, renewals, etc.

Net Receipts from Operation and Disbursements.

Net receipts from transportation and the gross disbursements of Southern Pacific Company in respect of its leased lines and of Proprietary Companies in respect of lines not leased, and the other disbursements of Southern Pacific Company and of such Proprietary Companies after excluding all offsetting transactions between them. The statement of disbursements does not include those charged to capital account, dividends and other items appearing in balance sheet.

The table as published has this closing item :

"Surplus over Fixed and Other Charges."

Miles.	Yr.		Net receipts from operation.	Disbursements.
7545	1900	Excluding Houston & T. C. and sub. lines in Texas.	\$20,837,957	\$21,127,052
8654	1901	Including above.....	26,365,884	26,365,884
8757	1902	Including above.....	26,762,826	31,375,080
8842	1903	Including above.....	25,718,535	19,307,205
9024	1904	Including above.....	27,400,884	21,112,162
9137	1905	Including above.....	29,541,723	19,735,173
9191	1906	Including above.....	35,047,360	19,179,384
			<hr/>	<hr/>
			\$189,675,169	\$158,201,940
Net surplus from operation.....				189,675,169
Fixed and other charges.....				158,201,940
				<hr/>
Balance.....				\$31,473,229

Appropriations for Betterments, Additions, Equipment, Sinking Fund Requirements, and Reserve for Depreciation Covered in Foregoing Disbursements.

For betterments, additions and equipment	\$29,181,015
For depreciation rolling stock	1,844,803
For sinking fund contributions.....	4,871,709
	<hr/>
	\$35,897,527

Income Other Than from Operation Accounted for in Statement from Which Foregoing Table was Prepared.

1900	Other income.....	\$4,207,725
1901	" "	3,831,823
1902	" "	3,617,384
1903	" "	2,363,101
1904	" "	2,589,762
1905	" "	2,625,344
1906	" "	3,324,672
		<hr/>
		\$22,559,811

Sinking Fund.

January 1, 1906—Amount to credit of sinking fund,
various companies..... \$16,400,980.96

Summary.

The following results do appear as far as we have gone, which is sufficient for the purposes of this case:

Maintenance of way—charged to operating expenses...	\$85,960,087
Maintenance of equipment—charged to operating expenses.....	73,473,632
	<hr/>
	\$159,433,719
Appropriation for betterments and equipment.....	29,181,015
Appropriation for depreciation of rolling stock.....	1,844,803
Appropriation for sinking fund contribution.....	4,871,709
	<hr/>
	\$195,331,246

That after making these appropriations a surplus was left applicable to the payment of dividends from receipts from operation of..... \$31,473,229

That from miscellaneous income during the same time the company received..... 22,559,811

Table Showing Traffic Density, Amount Paid for Maintenance of Way and for Equipment and Per Mile of Road by the Southern Pacific Company as Compared with the Other Roads set out Therein.

TABLE 3.

Year.	Traffic density.	Maintenance way.	Equipment.	Per mile total.
1900-1	563,056	\$1,175	\$901	\$2,076
1901-2	566,130	1,381	1,042	2,423
1902-3	569,487	1,478	1,222	2,700
1903-4	591,423	1,364	1,335	2,699
1904-5	600,738	1,503	1,421	2,924
1905-6	678,554	1,775	1,554	3,329
	<hr/>	<hr/>	<hr/>	<hr/>
Average.....	594,898	\$1,446	\$1,246	\$2,692
Atchison	557,005	1,123	1,113	2,236
Union Pacific.....	739,206	1,173	1,049	2,222
Nor. Pacific	729,102	1,300	791	2,091
Gt. Northern.....	650,321	960	594	1,554
Mo. P. (2 y'rs).....	623,807	819	821	1,640
Burlington	580,024	1,104	1,032	2,136

Rates on Commodities as Set Out Below from Portland, Lebanon, Salem, and Dallas to San Francisco, and Minimum Loading on Same in 1907, Also from Salem to New York, as Per Tariffs Named Below.

		<i>To</i>					
		San Francisco, Calif.					
		<i>From</i>					
Commodity.	Portland.	Distance in miles.	Salem.	Distance in miles.	Dallas.	Distance in miles.	Min.
Potatoes.....	20½	746	26½	694	30	809	30,000
Grain.....	20	746	20	694	21½	809	40,000
Mill stuffs...	20	746	20	694	21½	809	40,000
Newspaper...	20	746	...	.....	.....	.....	30,000

		<i>To</i>		
		San Francisco, Calif.		
		<i>From</i>		
		Lebanon.	Distance in miles.	Min.
Straw paper.....		20	676	30,000

		<i>To</i>		
		New York, N. Y.		
		<i>From</i>		
		Salem route.	Distance in miles.	Min.
Hops.....		150 Sunset & New Orleans.	5046	20,000
Dried prunes, in wood..		100	5046	40,000
In sacks.....		120		

Tariff Numbers.

Potatoes.....	S. P. Co.	Tariff #51-0,	I. C. C.	#2613,	Effective Nov. 30, 1906.
Grain and mill feed..	S. P. Co.	" #50-0,	"	#2612,	" Dec. 26, 1906.
Newspaper.....	} S. P. Co.	" #43-0,	"	#2337,	" Sept. 25, 1905.
Straw paper.....					

Exhibite B Introduced by Complainants.

The Oregon & California Railroad extends from the city of Portland to the Oregon-California State line, where it connects with the rails of the Southern Pacific Company. It has 666 miles of track, of which 368 is main line, the remainder is branch lines. The Southern Pacific Company operates, and for a number of years has operated, the Oregon & California Railroad as a part of its system.

The Willamette Valley lies in the State of Oregon south of the Columbia River and extends southward 150 miles; the Willamette River flowing through it. This river flows into the Columbia River and is navigable as far as Corvallis, a distance of 97 miles from Portland. All the navigable part of the stream practically parallels the rails of the Oregon & California Railroad Company, and runs at a distance from the railway of a few hundred feet to ten or twelve miles. The Willamette Valley mills extend as far south as Cottage Grove, 144 miles south of Portland.

At the time the \$3.10 rate was installed there was little traffic by rail between Portland and San Francisco. Portland, Seattle, Tacoma and Grays Harbor on Puget Sound, and various other places where lumber was produced, were reached from San Francisco by ocean going vessels, and at the time that this rate was established there was a large quantity of lumber moving by vessel from these points to San Francisco.

The following were the prices of lumber, logs and stumpage at Portland, prepared by R. B. Miller, Traffic Manager of complainant, for the years indicated below:

Year.	Rough com.	# 1.	Floor No. 2.	# 3.	Lots at mill.	Stumpage.
1893.....	\$7.00	18	13	9	4-5	15c. to 50c.
1894.....	6.00	16	12	8	3.50 to 4.50	"
1895.....	6.00	15	10	7	4-5	"
1896.....	6.00	16	11	8	4-5	"
1904.....	7.50	22	18	14	5-7	"
1905.....	9.00	24	20	16	5.50 to 7.50	"
1906.....	15.00	30	25	20	9.50 to 12.50	75c. to 2.25
1907.....	13.00	28	23	18	7.50 to 10.50	

In saw mills it is the average profit on which the manufacturer figures and at times and in instances some grades of lumber have to be sold at cost and others at less than cost, and there are different margins of profit on the different classes of lumber.

To eastern points from Pacific Coast points the rates are blanketed on both ends, that is, there is common territory to which the same rate applies. This is true as to rates on lumber from the Willamette Valley to California points. In what are known as the Eastbound Lumber Rate cases, Nos. 1327, 1329, 1335, the Commission established the following rates as just and reasonable:

From Portland to Roscoe, Neb., a distance of 1611 miles, and thence to Omaha, Nebraska, a distance of 1799 miles, a rate of 50 cents per 100 lbs., on all classes of fir lumber excepting on long timbers requiring two cars.

Between stations Sidney, Neb., to Roscoe, Neb., (80 miles) the rate is graded from 40 cents to 50 cents.

From Portland to Topaz, Idaho, a distance of 761 miles, and thence to Denver, a distance of 1535 miles, a rate of 40 cents per 100 lbs.

The Commission established a rate from Seattle and points south

of Seattle and north of Goble, Ore., to Nyssa, Ore., a distance of 640 miles from Seattle; to Salt Lake City, a distance of 1080 miles of 40 cents per 100 lbs. The points south of Seattle to which this rate applies are shorter distance than from Seattle.

The tariffs above referred to do not make any distinction between class of lumber or whether it is green or kiln dried, all fir lumber taking the same rate, except as above noted, whereas the rates in question in this proceeding from Willamette Valley points to San Francisco and San Francisco Bay points covers rough common green fir lumber and lath only. Other classes of fir lumber taking a rate to the same points of \$5.00 per ton. The rates above referred to apply to roads where the gradients are greater than over the Oregon & California Railroad and the expense of operation not so great as over the mountain portion of the Oregon & California Road.

Referring to the Annual Report of the Southern Pacific Company Pacific System for the year ending June 30, 1907, filed with the Interstate Commerce Commission, it appears that the commercial tonnage of lumber was 2,306,246; the earnings upon this were \$5,703,376.98, showing the lumber paid \$2.429 per ton or 42.9 cents per ton more than on the Oregon & California Railroad. The other commercial tonnage on that system was 13,889,937, and the total revenue \$44,997,358.99, making the amount received for freight on that system \$3.24 per ton or 31 cents more than the amount received on the Oregon & California Railroad.

The expenses and earnings of the Southern Pacific System were as follows for the year ending June 30, 1907:

Excluding Taxes.....	59.50
Including Taxes.....	62.00
Earnings per Train Mile:	
Passenger Trains.....	\$1.90
Freight Trains.....	3.95
Operating Expenses per Train Mile:	
Excluding Taxes.....	\$1.77
Including Taxes.....	1.90
Earnings per ton mile of freight.....	1.205

The average loading per freight train on the Oregon & California Railroad was 279.4 tons, while the average loading on the Southern Pacific Company Pacific System operating in California was 415.34 tons.

Endorsed: Filed January 31, 1910. Southard Hoffman, Clerk,
By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California. In Equity.

No. 14760.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Petition by Complainants, Southern Pacific Company and Oregon & California Railroad Company, for Appeal to the Supreme Court of the United States.

Complainants above named, Southern Pacific Company and Oregon & California Railroad Company, conceiving they are aggrieved by the order and decree made and entered on the 24th day of March, 1910, in the above-entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors which is filed herein, and pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, March 25th, 1910.

F. C. DILLARD,
W. W. COTTON,
P. F. DUNNE, AND
C. W. DURBROW,

Solicitors for Complainants.

R. S. LOVETT &
WM. F. HERRIN,
Of Counsel.

The foregoing claim of appeal is allowed, and it is ordered that said complainants and appellants shall file with the Clerk of this Court a bond to the defendant in the sum of One Thousand Dollars (\$1,000.00) to answer all costs if appellants shall fail to sustain their appeal.

Dated, March 25th, 1910.

WM. W. MORROW,
Circuit Judge.

Endorsed: Filed Mar. 25, 1910. Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California. In Equity.

No. 14760.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD
COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Assignment of Errors by Complainants Southern Pacific Company and Oregon & California Railroad Company on Their Appeal to the Supreme Court of the United States.

Now come complainants, Southern Pacific Company and Oregon & California Railroad Company, by F. C. Dillard, W. W. Cotton, P. F. Dunne and C. W. Durbrow, their solicitors, and having prayed for an appeal to the Supreme Court of the United States from the order and decree of the above-entitled Court, entered in the above-entitled cause on the 24th day of March, A. D. 1910, respectfully represent as grounds of appeal and as an assignment of errors herein, upon which they will rely in the said Supreme Court of the United States, that the said Circuit Court erred in the following particulars, to-wit:

1. The court erred in sustaining the demurrer of defendant to the paragraphs of complainants' bill pleading the unconstitutionality of the Interstate Commerce Law, because said law is unconstitutional in that it delegates to the Commission power to legislate, which, under the Constitution, is confided to Congress alone.

2. The court erred in sustaining said demurrer, because said Interstate Commerce Act is unconstitutional in that it confers upon the Interstate Commerce Commission power to fix a rate as a maximum, and the fixing of such rates is not a regulation of interstate commerce.

3. The court erred in sustaining said demurrer, because said Interstate Commerce Act is unconstitutional in that it unites in one body functions which are legislative, judicial and executive, and the same are so intermingled that one cannot be permitted to stand while the others are taken away.

4. The court erred in sustaining said demurrer, because the machinery provided by the Interstate Commerce Act for a judicial review of a rate fixed by the Commission is so constructed and so restricted in operation, and the penalties imposed for failure to adopt the rate are so severe as to amount to a deprivation of the carrier's property without due process of law.

5. The court erred in dismissing complainants' bill and refusing to set aside the order of the Interstate Commerce Commission, because it appears from the report and order of the Commission that it did not find the rate reduced by it to be unjust or unreasonable in itself, or more than a fair compensation for the service rendered; on

the contrary, the report shows that the Commission found the rate reasonable in itself, and reduced it for causes extraneous to the question of its justness and reasonableness. The report further shows that the Commission did not find the rates to which the reductions were made to be reasonable, but on the contrary found them to be less than fair remuneration for the service rendered. In reducing the rate after these findings, the Commission exceeded any power conferred upon it by law, because, aside from the question of discrimination, when a carrier fixes a rate which is just and reasonable for the service performed the Commission is without power to reduce it.

6. The court erred in dismissing the bill and refusing to set aside the order of the Commission, because the report of the Commission, taken in connection with the proceedings and evidence had before them when the hearing was had, showed that the Commission did not find the rate of \$5 to be unreasonable in or of itself or for the service rendered, and did not find the rates of \$3.40 and \$3.65 fixed by them to be reasonable in and of themselves; on the contrary, really found the higher rate to be reasonable in and of itself for the service rendered, the lower rate to be unreasonable, and reduced the rates of the carriers on grounds of estoppel growing out of the circumstances under which the rate was inaugurated, and in an endeavor for such reasons to force the carriers to maintain the lower rates irrespective of the question of the reasonableness of the rate in itself.

7. The court erred in dismissing the complainants' bill and refusing to set aside the order of the Commission, because it appeared that the rates fixed by the Commission were less than a reasonable return and fair compensation for the service rendered by complainants in hauling the lumber, and the action of the court was therefore confiscatory of complainant's property, and deprived them of their property without due process of law.

8. The court erred in dismissing complainants' bill and refusing to set aside the order of the Commission, because it appeared from the evidence that the rates fixed by the Commission would not pay the cost of the service rendered by the carriers in hauling the lumber, and to force them to carry at such rate deprived them of their property without due process of law, and devoted their property to public use without just compensation.

9. The court erred in dismissing complainants' bill and not setting aside the order of the Commission, because it appeared from the stipulation made that the Commission in fixing the rate took into consideration matters in their official cognizance, of which the carriers could not know, and which, not being introduced in evidence, they had no opportunity to meet, and the Commission thus exceeded any power granted them by law, which is only to fix a rate, not of their own motion, but after full hearing had and evidence introduced.

10. The court erred in dismissing complainants' bill and refusing to set aside the order of the Commission, because it appeared from the Commission's report and all the evidence in the case that the equities were with complainants, and the Commission in setting

aside the rate fixed by the carriers exceeded any power granted them by law, and fixed, in the stead of such rate, rates unjust, unreasonable, unremunerative and confiscatory.

11. The court erred in holding that the pleadings have been changed since the cause was last presented to the court, and no longer raise the point then made that the rates fixed were below the cost of transporting lumber.

12. The court erred in assuming that the pleadings did not raise the point, or had ever failed to raise the point, that the rates as fixed by the Commission were below the cost of transporting the lumber in question.

13. The decree is not supported by the evidence, and is contrary to law and the equities of the case.

Wherefore, complainants pray that said judgment and decree may be reversed.

SOUTHERN PACIFIC COMPANY AND
OREGON & CALIFORNIA RAILROAD
COMPANY,

By F. C. DILLARD,
W. W. COTTON,
P. F. DUNNE, &
C. W. DURBROW,
Their Attorneys.

R. S. LOVETT,
WM. F. HERRIN,
Of Counsel.

Endorsed: Filed Mar. 25, 1910. Southard Hoffman, Clerk, By
J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern
District of California. In Equity.

No. 14760.

SOUTHERN PACIFIC COMPANY and OREGON & CALIFORNIA RAILROAD
COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Bond on Appeal to the Supreme Court of the United States.

Know all men by these presents, that we, Southern Pacific Company, a corporation, as principal, and National Surety Company, a corporation, as surety, are held and firmly bound unto the above-named defendant, Interstate Commerce Commission, in the sum of One Thousand Dollars (\$1,000.00), to be paid to said defendant, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 25th day of March, in the year of our Lord, one thousand nine hundred and ten.

Whereas the above-named Southern Pacific Company and Oregon & California Railroad Company have prosecuted an appeal to the Supreme Court of the United States to reverse the order and decree entered in the above-entitled suit on the 24th day of March in the year of our Lord one thousand nine hundred and ten:

Now, therefore, the condition of this obligation is such that if the above-named Southern Pacific Company and Oregon & California Railroad Company shall prosecute the said appeal to effect and answer all costs, if they shall fail to sustain their said appeal, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

[Seal Southern Pacific Co.]

SOUTHERN PACIFIC COMPANY,
By E. E. CALVIN, *Vice-President*.
W. F. INGRAM, *Assistant Secretary*.

[Seal National Surety Co.]

NATIONAL SURETY COMPANY,
By FRANK L. GILBERT,
Resident Vice-President.
A. E. OBERG,
Resident Assistant Secretary.

Sealed and delivered and acknowledged before me this 25th day of March, in the year of our Lord one thousand nine hundred and ten by Frank L. Gilbert and A. E. Oberg.

[SEAL.] JULIUS CALMANN,
*Notary Public in and for the City and County of
San Francisco, State of California.*

The foregoing bond is approved this 25th day of March, in the year of our Lord one thousand nine hundred and ten.

WM. W. MORROW,
Circuit Judge.

Endorsed: Filed Mar. 25, 1910. Southard Hoffman, Clerk, J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit,
Northern District of California.

No. 14760.

SOUTHERN PACIFIC COMPANY et al., Complainants,
vs.
INTERSTATE COMMERCE COMMISSION, Defendant.

Clerk's Certificate to Transcript of Record.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing four hundred and twenty-nine (429) pages, numbered from 1 to 429 inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record on appeal is \$303.60; that the said amount was paid by the Southern Pacific Company; and that the original citation issued in said cause is hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 22nd day of April, A. D. 1910.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
*Clerk of United States Circuit Court, Ninth Judicial
Circuit, Northern District of California.*

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to Interstate Commerce Commission, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, District of Columbia, within sixty (60) days from the date of this writ, pursuant to an appeal duly allowed by the Circuit Court of the United States for the Ninth Circuit, Northern District of California, and filed in the Clerk's office of said Court on the 25th day of March A. D., 1910, in a cause wherein Southern Pacific Company and Oregon & California Railroad Company are appellants, and you are appellee, to show cause, if any, why the decree and order rendered against said appellants as in their said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Wm. W. Morrow, Judge of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, this 25th day of March, A. D. 1910.

WM. W. MORROW,
United States Circuit Judge.

Service of the within citation, by copy, admitted this 25th day of March, A. D. 1910.

ROBT T. DEVLIN, *U. S. Att'y,*
Solicitors for Defendant and Appellee.

[Endorsed:] In Equity No. 14760. United States Circuit Court, Ninth Circuit, Northern District of California. Southern Pacific Company and Oregon & California R. R. Co., Complainants, vs. Interstate Commerce Commission, Defendant. Citation. Filed Mar. 25, 1910. Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk. F. C. Dillard, W. W. Cotton, P. F. Dunne, and C. W. Durbrow, Attorneys for Complainants, 828 Flood Building, San Francisco, California.

Endorsed on cover: File No. 22,135. N. California C. C. U. C. Term No. 909. Southern Pacific Company and Oregon & California Railroad Company, appellants, vs. Interstate Commerce Commission. Filed May 2d, 1910. File No. 22,135.

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U. S. DEPT. OF JUSTICE

Supreme Court of the United States

OCTOBER TERM, 1905

No. **527**

SOUTHERN PACIFIC COMPANY and OREGON &
CALIFORNIA RAILROAD COMPANY,

vs.
INTERSTATE COMMERCE COMMISSION.

MOTION TO ADVANCE

MAXWELL EVARTS,

Of Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM 1909.

No.

SOUTHERN PACIFIC COMPANY
and OREGON & CALIFORNIA
RAILROAD COMPANY,
Appellants.

vs.

INTERSTATE COMMERCE COM-
MISSION,
Appellee.

*Appeal from the Circuit Court of the United
States for the Northern District of Cali-
fornia.*

TO THE HONORABLE THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES.

I.

This suit was instituted by the appellants to
enjoin the enforcement of a certain freight rate

fixed by order of the Interstate Commerce Commission. A demurrer of the Interstate Commerce Commission to the original bill was sustained (Rec. p. 32). By leave of Court an amended bill was filed on August 1, 1908 (p. 32) to which the Commission demurred (p. 51). The case came on for argument upon the demurrer to the amended bill and the three Circuit Judges constituting the Court certified that they were divided in opinion and submitted the entire case to this Court for decision (p. 53). Because no judgment, opinion or decision of the Circuit Court had been rendered by the Circuit Court this Court declined to take jurisdiction and remanded the case. 215 U. S., 226. In accordance with the mandate of this Court the Circuit Court has again heard the case and upon such hearing has entered a decree dismissing the bill.

The order of the Commission in question (p. 35) establishes maximum rates of \$3.40 and \$3.65 per ton from different points in the Willamette River Valley in the State of Oregon to San Francisco and Bay points upon rough green fir lumber and lath in carloads and directs the carriers to cease and desist from charging their then

effective rate of \$5 per ton for such transportation. Prior to 1898 no lumber was cut in the Willamette Valley except a small amount for local consumption. For the purpose of introducing Willamette Valley lumber into San Francisco and Bay points the appellants in 1899 established a rate of 3.10 per ton and continued the same rate in effect with a single brief interruption until April, 1907. Under the stimulus of this rate the lumber business in the Willamette Valley developed rapidly until the industry, exclusive of Portland, comprised over 250 mills with a capacity of 1,300,000 feet per annum.

The appellants' \$5. rate was not set aside by the Commission because it was unreasonable in itself and the \$3.40 and \$3.65 rates were not established because they were regarded by the Commission as reasonable maximum rates for the service rendered. The reduction was ordered without any investigation by the Commission of the value of the service rendered. No evidence was introduced in the proceeding upon which such a determination could have been made. In the proceeding before the Commission the attorney for the complaining shipper conceded (p. 57) that the \$5. rate was not unreasonable in itself.

The rate was reduced solely because the lumber mills had been established in the Willamette Valley on the belief that rates sufficiently low to meet ocean competition from Portland would be maintained. While admitting that the \$3.10 rate was an exceedingly low rate the Commission held in substance that by reason of the circumstances under which that rate was established the carriers were estopped to increase it, except by a small amount corresponding with the increase which had occurred in the competitive water rates from Portland (pp. 17, 22 and 25). The Commission has sought to give its order an appearance of regularity by including a formal statement that the existing \$5. rate was unjust and unreasonable. Its opinion contained also some speculation as to whether the reduced rates would yield a reasonable return. Upon this speculation the Court below has seized for the purpose of sustaining the Commission's order. There was, however, before the Commission and before the Circuit Court no evidence tending in the slightest degree to show that the \$5. rate was unreasonable or that the reduced rates were a fair compensation for the service rendered. The dissenting opinion of Commissioners Harlan and Knapp (p. 27) con-

clusively confirms the conclusion that the \$5. rate was not condemned by the Commission as unreasonable in itself but was reduced because of certain supposed equities existing between the complaining shipper and the defendant carriers and upon the theory of estoppel.

II.

The principal propositions involved in this appeal are :

1. That the Interstate Commerce Commission exceeded its authority and jurisdiction in prescribing maximum rates corresponding with competitive rates for water transportation.

2. That the Interstate Commerce Commission exceeded its authority and jurisdiction in prescribing maximum rates to enforce an alleged estoppel against the appellants.

3. That the Interstate Commerce Commission exceeded its authority and jurisdiction in reducing a rate not claimed or found to exceed a just and reasonable compensation for the service rendered.

III.

The questions presented by this appeal are of great public importance. They concern the limitations of the power conferred upon the Interstate Commerce Commission. It is of vital importance to the public generally and to those engaged in the transportation business of the country especially that the rate making powers of the Interstate Commerce Commission should be defined by the earliest practicable adjudication of this court.

The Attorney General for the purposes of the hearing in the Court below certified that in his opinion the case was of general public importance and accordingly requested and secured its expedition under the Act of February 11, 1903 (Rec. p. 29).

This appeal is entitled as a matter of right to a preference under the provisions of Section 16 of the Act to Regulate Commerce as amended by Section 5 of the Act of June 29, 1906 (34 Stat. 590), making applicable to suits to enjoin the orders of the Interstate Commerce Commission the provisions of the Expedition Act of February 11, 1903 (32 Stats. 823). This section as amended provides that "it shall be the duty of

the Attorney General in every such case to file the certificate provided for in said Expediting Act of February 11, 1903, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States the case shall have in such Court priority in hearing and determination over all other causes except criminal causes."

Wherefore the appellants pray this Honorable Court that this appeal may be advanced upon the docket and heard at as early a day in the October 1910 Term as may be convenient to the Court.

Dated May 7, 1910.

Respectfully submitted,

MAXWELL EVARTS,
Of Counsel for Appellants.

NOTICE OF MOTION.

Please take notice that the foregoing motion to advance will be submitted to the Supreme Court of the United States on Monday, the 16th day of May, 1910, at the opening of Court on that day or as soon thereafter as counsel can be heard.

Dated May 7, 1910.

MAXWELL EVARTS,
Of Counsel for Appellants.

TO HONORABLE GEORGE W. WICKERSHAM,
Attorney General of the United States.
HONORABLE LLOYD W. BOWERS,
Solicitor General of the United States.

BEFORE THE
Interstate Commerce Commission.

No. 1331.

WESTERN OREGON LUMBER MANUFACTURERS
ASSOCIATION

vs.

SOUTHERN PACIFIC COMPANY AND THE OREGON
& CALIFORNIA RAILROAD COMPANY.

**APPLICATION FOR HEARING ON QUESTION OF
REPARATION.**

This case having been fully heard and considered by the Commission, and the Commission having, on the first day of June, 1908, entered its report and order herein, which report and order reserved all questions of reparation for further proceedings—

Comes now The Booth-Kelly Lumber Company, a member of complainants in the above-entitled cause, and asks that this case be set down for hearing on the question of reparation on a date to be hereafter fixed by the Commission.

In support of said application there is attached hereto a statement of shipments of rough green fir lumber made during the period of the advanced rates from Oregon points to California points, which advanced rates were declared by the Commission to be unjust and unreasonable, and on which petitioner asks reparation.

THE BOOTH-KELLY LUMBER CO.,
Per L. L. LEWIS.

Statement of shipments of Rough Green Fir Lumber made during the period of advanced rates from Southern Pacific Oregon points to California points, as shown, and prior to publication of present rates, ordered by the Interstate Commerce Commission for a period of two years, from October 15, 1908, in Case No. 1331, Western Oregon Lumber Manufacturers' Association vs. Southern Pacific Company et al.

From	To	Car and int.	Date shipped.	Weight.	Ship to	Ch'gd.	Ordered by
Cottage Grove.....	San Francisco.....	S. P.	4-18-07	55000	3 10	5 00	3 40
Springfield.....	San Francisco.....	S. P.	4-19-07	63000	3 10	5 00	3 40
Springfield.....	Benicia.....	O. S. L.	5-11-07	62740	3 10	5 00	3 40
Springfield.....	Stockton.....	O. S. L.	5-10-07	78300	4 30	5 00	4 60
Coburg.....	Stockton.....	U. P.	5-18-07	75650	4 30	5 00	4 60
Wendling.....	San Francisco.....	T. & N. O. ..	4-18-07	56500	3 35	5 25	3 65
Saginaw-Oakland.....	Alameda Point.....	U. P.	4-22-07	43100	3 10	5 00	3 40
Saginaw.....	San Francisco.....	O. R. & N. ..	4-19-07	52800	3 10	5 00	3 40
Saginaw.....	San Francisco.....	C. O. & G. ..	4-24-07	49800	3 10	5 00	3 40
Hyland.....	Berkeley.....	T. & N. O. ..	4-18-07	63700	3 10	5 00	3 40
Hyland.....	Berkeley.....	T. P.	4-22-07	58500	3 10	5 00	3 40
Springfield.....	Benicia.....	A. T. & S. F. ..	5-31-07	38040	3 10	5 00	3 40
Springfield.....	Stockton.....	S. P. N. M. ..	5-23-07	58850	4 30	5 00	4 60
Coburg.....	So. Vallejo.....	U. P.	6-20-07	58500	3 10	5 00	3 40
Donna.....	San Francisco.....	U. P.	6-6-07	45600	3 35	5 25	3 65
Donna.....	San Francisco.....	U. P.	5-31-07	35200	3 35	5 25	3 65
Springfield.....	San Francisco.....	T. & N. O. ..	6-17-07	62650	3 10	5 00	3 40

Cottage Grove.....	East Oakland.....	T. & P.	7662	6-1-07	48900	3 10	5 00	3 40
Coburg.....	Palo Alto.....	O. S. L.	13122	6-20-07	48500	3 55	5 00	4 30
Donna.....	East Oakland.....	U. P.	56480	6-3-07	40980	3 35	5 00	3 65
Coburg.....	Stockton.....	U. P.	5659	7-3-07	40700	4 30	5 00	4 60
Coburg.....	Stockton.....	O. R. & N. ..	7054	7-12-07	38500	4 30	5 00	4 60
Coburg.....	Martinez.....	U. P.	67129	7-12-07	44100	3 10	5 00	3 40
Junction City.....	Stockyards.....	U. P.	49335	10-16-07	49400	3 10	5 00	3 40
Junction City.....	Stockyards.....	S. P.	82185	10-19-07	44700	3 10	5 00	3 40
Junction City.....	Stockyards.....	S. P.	8485	11-19-07	52200	3 10	5 00	3 40
Springfield.....	San Francisco.....	S. P.	80526	11-9-07	48500	3 10	5 00	3 40
Coburg.....	So. Vallejo.....	M. L. T.	33484	1-29-08	48900	3 10	5 00	3 40
Coburg.....	So. Vallejo.....	U. P.	65829	1-27-08	40600	3 10	5 00	3 40
Coburg.....	So. Vallejo.....	U. P. ....	.....	8-4-08	35500	3 10	5 00	3 40
Coburg.....	So. Vallejo.....	S. P.	84869	8-6-08	43050	3 10	5 00	3 40
Saginaw.....	San Francisco.....	O. S. L.	4358	8-14-08	53200	3 10	5 00	3 40
Junction City.....	Oakland.....	O. R. & N. ..	3297	8-13-08	36400	3 10	5 00	3 40
Coburg.....	Suisun.....	O. S. L.	26758	6-5-08	70000	4 40	5 00	4 15
Coburg.....	Tracy.....	O. R. & N. ..	5436	5-26-08	32980	4 30	5 00	4 60
Saginaw.....	San Jose.....	O. S. L.	26036	6-4-07	93400	3 70	5 00	4 40
Saginaw.....	San Jose.....	U. P.	11057	5-31-07	84800	3 70	5 00	4 40
Saginaw.....	San Jose.....	U. P.	66050	5-16-07	51100	3 70	5 00	4 40
Saginaw.....	San Jose.....	U. P.	65317	5-16-07	52200	3 70	5 00	4 40
Coburg.....	Vacaville.....	U. P.	67485	7-9-08	43500	4 40	5 00	4 40

Recapitulation.

Charged—		
960.88 tons @ \$5.00 (actual charge)	.....	\$4805.18
96.14 tons @ \$2.25 (actual charge)	.....	468.00
		<hr/>
		\$5273.18
Should be—		
1153280 # @ \$3.10/2000 #	.....	\$2087.58
178280 # @ 3.35/2000 #	.....	298.62
324980 # @ 4.30/2000 #	.....	698.71
281500 # @ 3.70/2000 #	.....	520.78
70000 # @ 4.40/2000 #	.....	154.00
43500 # @ 4.40/2000 #	.....	95.70
48500 # @ 3.55/2000 #	.....	86.09
		<hr/>
		3941.48
Difference.....		<hr/>
		\$1331.70

NOTE.—In case of shortage, loss or damage, please send us at once your original unloading tally, together with affidavit giving a full statement of facts. Otherwise we cannot entertain your claim.

NOTE BY APPELLANTS' COUNSEL.—The evidence on the above complaint was heard by the Commission through one of its examiners, in October just past, and the case, on the complaint and evidence, is now pending before the Commission for their determination as to the award of damages.

NOV 28 1910

JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 527.

SOUTHERN PACIFIC COMPANY AND OREGON AND
CALIFORNIA RAILROAD COMPANY,

Appellants,

vs.

INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE APPELLANTS.

MAXWELL EVARTS,

F. C. DILLARD,

Counsel for Appellants.



Supreme Court of the United States,

OCTOBER TERM, 1910.

No. 527.

SOUTHERN PACIFIC COMPANY AND
OREGON AND CALIFORNIA RAIL-
ROAD COMPANY, APPELLANTS,

vs.

INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE CIRCUIT COURT OF THE
UNITED STATES FOR THE NORTHERN
DISTRICT OF CALIFORNIA.

BRIEF FOR THE APPELLANTS.

Statement.

The Willamette river flows north across western Oregon and empties into the Columbia river at or near the City of Portland. It runs through

large forests of fir and is navigable for one hundred miles from its mouth (Rec., p. 385). The road of the complainants follows the valley of the Willamette throughout its entire length of about one hundred and fifty miles (Rec., p. 385).

Prior to 1899, the lumber along the Willamette had not been cut, largely because it could not compete in the San Francisco market with timber on the tidewater in and around Portland, and partly because of the quality of the lumber, the fir of the Willamette Valley not being as desirable as the pine in other parts of the State.

In that year the Oregon and California Railroad Company decided to foster the lumber industry along the line of its road and to make such a low rate to San Francisco that it would encourage the building of mills throughout the valley (Record, p. 16). There were two courses open to the railroad. Either to wait until the timber in the tidewater had been cut and the lumber in the Willamette Valley came to market in the natural order of things, and at a remunerative rate, or to develop the country and move the lumber at once by making a very low freight rate, to be increased to a fair rate for the service performed

when the lumber industry had become firmly established. The latter policy was adopted, and, after discussing the matter with lumbermen, a rate was made, in the year 1899, of \$3.10 per ton from Portland and Willamette Valley points to San Francisco and San Francisco Bay points (Record, p. 17).

At the time this rate was made no lumber was sawed along the Willamette. At the present time, south of Portland, there are two hundred and fifty mills (Record, p. 118), and in one alone, in the year 1906, the cut was over eighty-two million (82,000,000) feet (Rec., p. 71), while the total cut of all the mills in one year is about six hundred million (600,000,000) feet (Record, p. 118). At the present time lumber is worth very nearly twice as much as it was in 1899 (Record, p. 385), while the cost of operating the road of the complainants has increased in about the same proportion. The \$3.10 rate of 1899 was a very low lumber rate for an ordinary road (Record, p. 191), but exceedingly so for a road with the tremendous grades of the Oregon and California. The total rise between Portland and San Francisco going either way is over ten thousand (10,000) feet, and in crossing the Siskiyou Mountains there

is a rise of over twenty-three hundred (2,300) feet in fifteen (15) miles (Record, p. 196). The grade is such that helper engines have to be used on two hundred and three (203) miles of the road—sometimes one helper engine and in some places two helper engines in addition to the regular engine (Rec., p. 196). The road is also expensive to operate because of the many washouts due to the mountainous character of the country through which it runs.

This rate, therefore, which had been low in 1899, became in time under the changed conditions unreasonably low, and in January, 1904, the railroad raised the rate to \$5 (Record, p. 12).

Upon the representation of lumber interests that they were in bad financial condition the railroad company lowered the rate upon green fir lumber and lath only, to \$3.10 per ton. This was done to help the lumbermen through their financial difficulties, and when lumber had gone up in value and the mills were prosperous the rate was restored in April, 1907, to \$5, which is in and of itself a low rate for the service performed (Record, p. 191).

Thereupon and in November, 1907, a complaint was filed with the Interstate Commerce

Commission by the Western Oregon Lumber Manufacturers' Association complaining of the \$5 rate from Willamette Valley points to San Francisco and praying for a reduction thereof (Record, p. 3), and upon the hearing of this complaint it was developed beyond any possibility of doubt that the \$5 rate was in itself reasonable.

On this point counsel for the lumbermen said in answer to questions addressed to him by Commissioner Prouty (Rec., p. 57):

"COMMISSIONER PROUTY: Let me ask you, Mr. Teal, this question. Suppose that rate had never been lower than 25 cents a hundred pounds, which is \$5 a ton, would you claim that this Commission to-day ought to reduce that rate?

"MR. TEAL: No; I don't think I would.

"COMMISSIONER PROUTY: *That is to say, you do not claim the rate is unreasonable in itself?*

"MR. TEAL: *No, I do not.*

"COMMISSIONER PROUTY: You put your case entirely on the ground that these people represented to your clients and to other mill men in the Willamette Valley that they would establish this lower rate for the purpose of building up the industry in that valley, that the industry cannot exist there

in competition with other sections unless that rate is maintained in effect ?

"MR. TEAL: Yes, sir.

"COMMISSIONER PROUTY: And therefore the railroad is obliged to maintain it in effect ?

"MR. TEAL: It has been maintained for eight or nine years. You have my position exactly, Mr. Commissioner.

"COMMISSIONER PROUTY: That simply shows that it has been maintained and industries have grown up; that the railroad company has during that period elected to maintain it and found it profitable, probably ?

"MR. TEAL: You have stated my position exactly. *I am not here complaining about the rates being high or low, because it is a low rate.*"

Again, at page 62 of the Record the point is emphasized that the \$5 rate is a low and reasonable rate when Commissioner Prouty says:

"COMMISSIONER PROUTY: That seems to be your case, Mr. Teal. If they can, there is no reason from your statement why the rates should be reduced, *because you say the rate is low enough*, unless those men have been induced to build their mills there, and ought to be protected.

"MR. TEAL: That is correct. I want you to understand, Mr. Commissioner, that I do not claim the Commission has a right to compel the railroad under ordinary circumstances to meet water rates or any other competition."

Notwithstanding that it was demonstrated by the lumbermen themselves that the \$5 rate was reasonable and fair in itself with reference to the service performed, and notwithstanding that the Commission had more than once sustained a higher rate per ton per mile for a longer haul over easily operated roads, the Interstate Commerce Commission by an order dated June 1, 1908, required the railroad companies to desist from charging the \$5 per ton rate on green fir lumber from Willamette Valley points to San Francisco and San Francisco Bay points and to put in force between such points a rate not exceeding \$3.40 per ton, except from points on the west bank of the river north of Corvallis from which a maximum charge of \$3.65 was permitted (Record, p. 27).

There is nothing in the opinion of the Commission which in any way indicates that it considered the \$5 rate other than a reasonable rate. It

was agreed that the profits of the lumber business had been very large, Commissioner Prouty saying that "for the last ten years lumber operations upon the Pacific coast had been wonderfully profitable, and these extraordinary profits have led to an abnormal development of the business. What is true of the whole coast is true of the Willamette Valley, but in a somewhat less degree" (Rec., p. 21).

It was agreed that the roads were expensive to operate and at page 21 the Commission says, "all this lumber in reaching San Francisco must be hauled over the Siskiyou Mountains, where grades are extremely heavy and the cost of operation unusually high."

The decision was finally squarely placed upon the proposition that a low rate established by a railroad for the express purpose of encouraging and developing an infant industry could not be raised when the industry had become strong and established, as was the fact in the present case. The point of the decision is found in the following paragraph at page 25 of the Record :

"No argument and no citation of authority can, however, add to the naked statement of the fact. Take, for example, the

case of Mr. Miles. This gentleman had established a mill upon the strength of the \$3.10 rate, which he was operating in the year 1903. He had also made arrangements for the building of another mill and for the purchase of a large tract of timber. Hearing rumors that this rate was to be withdrawn, he suspended his operations. Subsequently, upon being assured by the officials of the Southern Pacific Company that it would continue its former policy, and relying upon the restoration of the rate itself, he resumed the construction of his mill and completed the purchase of his timber. Is it just and reasonable that within less than three years this company shall be allowed to again reverse its policy and to destroy the value of this man's property? We think not; the tremendous interests involved in the stability of railway rates must not be juggled with in this manner."

The circumstances which the Commission is supposed to have considered are that by the establishment of the extraordinarily low \$3.10 rate an industry had grown in a few years' time from nothing to the enormous total of a cut of six hundred million (600,000,000) feet of lumber a year worth the fabulous

sum of over twelve million dollars (\$12,000,000), and that the price of lumber had doubled in value from 1899 to 1907, and that during the same time the cost of operation to the railroad had greatly increased. This further fact was, we take it, also considered by the Commission, viz., that during this period the Willamette lumbermen had acquired an eastern outlet through Portland, which they did not have before, and that the larger part of their lumber went to eastern markets via Portland, making them independent to a great extent of the San Francisco market, which was their only market when the \$3.10 rate was made in 1899. About 7,000 cars of lumber were shipped from the Willamette Valley in 1907 to eastern points via Portland. Less than 5,500 cars went south to California points and of this only 20 per cent. moved under the \$3.10 rate. The total shipment of lumber from the Willamette Valley to all points was about 12,500 cars of which only about 1,000 were affected by this proceeding (Record, pp. 20 and 21).

That the decision of the Commission was based upon the novel proposition that it had the general powers of a court of equity was certainly

the opinion of the dissenting members, who, speaking through Commissioner Harlan, said at page 27 of the Record :

" The \$3.10 rate is conceded to have been a low rate, and I do not understand that the present rate of \$5 is condemned in the opinion of the Commission as unreasonable in itself and apart from the matters of estoppel on which the opinion seems largely to rest. In my judgment, we are not warranted, under the act to regulate commerce as amended, in condemning a rate upon such considerations. When preference and discriminations are not alleged, the test of the lawfulness of a rate is whether as a rate for the service offered it is reasonable or excessive. This is not the test to which the rate complained of in this proceeding has been subjected as I read the opinion. It is not held to be unlawful on the ground that it is an excessive rate, but is reduced rather because of certain supposed equities existing between the complaining shippers and the defendant carriers. Without enlarging upon this view of the matter it will suffice to say that I do not understand that we are authorized to deal with a rate on those grounds."

After the filing of the order of the Commis-

sion of June 1, 1908, the Southern Pacific Company and the Oregon and California Railroad Company filed under the provisions of the Interstate Commerce Act a bill in equity in the Circuit Court of the United States for the Northern District of California to enjoin the Commission from enforcing said order and to set the same aside (Record, p. 2).

A certificate was then filed in said United States Circuit Court in August, 1908, by the Attorney-General of the United States under the provisions of the Act of Congress of February 11, 1903, commonly called the Expediting Act, asking that the case be given precedence over all other business and be assigned for hearing before not less than three of the Circuit Judges of the Ninth Circuit (Record, p. 29).

Afterwards and in September, 1908, the Interstate Commerce Commission filed its demurrer to the bill of complaint filed by the railroad companies alleging that the act of the Commission was final and conclusive and not reviewable by the courts (Record, p. 30).

Upon argument the demurrer was sustained and thereafter and in October, 1908, the complainants by leave of court filed an amended bill

(Record, p. 32) to which the Commission again filed a demurrer similar to the demurrer interposed to the original bill of the complainants (Rec., p. 51).

Upon the argument of the demurrer to the amended bill the court was divided in opinion as to whether the demurrer should be sustained and as provided by statute certified the whole matter to this Court.

The case came on for argument before this Court upon the certificate of the lower court in October, 1909, and was dismissed upon the ground that the case could not under the circumstances be certified to this Court (*Southern Pacific Company vs. Interstate Commerce Commission*, 215 U. S., 226). The case was remanded to the Circuit Court with directions to proceed therein in conformity with law (Record, p. 362). Thereafter on January 31, 1910, the Interstate Commerce Commission filed a demurrer and answer to the amended bill of complaint (Record, p. 335). Afterwards on March 24, 1910, a final decree was entered dismissing the amended bill of complaint (Record, p. 364), and from said final decree this appeal has been taken.

The important question presented is, whether the Interstate Commerce Commission can exercise the general powers of a court of equity in a matter of purely equitable jurisprudence without review by this or any other court? To put it in another way, is the Interstate Commerce Commission in passing upon the reasonableness of a rate limited in its jurisdiction to whether the rate is reasonable in reference to the service performed, as has always been heretofore supposed, or can it hold a rate unreasonable not at all with regard to the service performed, but because of a supposed estoppel arising out of the past relations between the carrier and shipper, which in no possible way affects the reasonableness of the rate with reference to the value of the transportation furnished?

FIRST POINT.

The Interstate Commerce Commission was without power to order the railroads to desist from charging a \$5 per ton rate on green fir lumber from Willamette Valley points to San Francisco and to put in force between such points a rate not exceeding \$3.40 per ton.

Any power in the Commission to act upon the complaint of the Western Oregon Lumber Manufacturers' Association is derived from Section 15 of the Interstate Commerce Act as amended June 29, 1906 (34 U. S. Stat., 589) and the only portion of that section of any consequence in this discussion is that which provides that when the Commission

"shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property . . . *are unjust or unreasonable*, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe

what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged."

From reading the above it is plain that as a condition precedent to the order entered by the Commission there must have been some finding that the rate before it for consideration was "unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation" of the Act, and the whole question comes to this—was there such a finding in this case within the meaning of the words "unjust or unreasonable" as used by Congress, for we may eliminate entirely from our consideration the other words found in the section, as there is no contention that the rate of \$5 per ton was "unjustly discriminatory or unduly preferential or prejudicial," or that it in any way violated the act otherwise than that it was "unjust or unreasonable."

Our first interest is to ascertain just what Congress intended by the phrase "unjust or unreasonable." Are these words to be construed in their broadest possible sense or are they qualified by the general purpose of the Act in which

they are found? Are they used as signifying unfair and not right from whatever cause, or do they mean simply that the rate charged must bear a just and reasonable relation to the service performed. Railroads sell transportation just as a merchant sells dry goods, and heretofore it has been supposed that Congress gave power to the Commission to act only when the transportation sold was not commensurate with the rate charged. That is to say, the rate must bear a just and fair and reasonable relation to the transportation furnished—to the service performed. If under some form of paternal government a statute were to enact that a merchant should not charge for his dry goods more than a just and reasonable rate it would require a strong imagination to suppose that this meant more than that the goods should be worth what was asked for them; and it never would occur to anybody that it could mean that the merchant could not increase his price because a man had moved into town attracted by the low price of groceries, if, on the increased price, he sold full value for the price charged.

It would seem as if section 15 of the Commerce Act should be given a plain and sensible construction, and it is inconceivable that Con-

gress intended to vest the full powers of a court of equity in an administrative body with no review of its decision without so declaring in unmistakable words. The Interstate Commerce Act will be searched in vain for any clause indicating that it was the intention of Congress to give to the Commission such extraordinary powers, greater even than any to be found in a circuit court of the United States; for there is a right of appeal from the decrees of a circuit court. It would be strange indeed if Congress intended to depart from the long established principles of jurisprudence and place questions of estoppel by conduct and other strictly equitable questions in the hands of an administrative body without opportunity for review, and it would be stranger still if Congress should do this without one definite word to that effect or anything in the Commerce Act from which such intention could be gathered.

The whole case hinges on this alone—what do the words “unjust or unreasonable” mean? Are we to impute the vesting by Congress of such extraordinary power in an administrative body like the Commission by con-

struing the words in their broadest dictionary sense or are we to assume that Congress never intended to make the Commission a higher judicial body even than a court of equity and give to the words the meaning always heretofore attributed to them, viz : that a rate charged for the transportation of freight must be just and reasonable with regard only to the service performed.

The wording of the first section of the Act would seem to settle the meaning of the words used in section 15 and to dispose entirely of the notion that they were used in anything but a limited sense. The clause of section one of the Act is as follows :

“ All charges made for *any service rendered or to be rendered* in the transportation of passengers or property . . . shall be just and reasonable ; and every unjust and unreasonable charge *for such service* . . . is prohibited and declared to be unlawful.”

We, therefore, submit that the words “ unjust and unreasonable ” must be considered with reference to the purpose and intention of the Interstate Commerce Act, which simply was to place in the hands of an administrative body a

supervision of rates so as to prevent discrimination in favor of one shipper against another and the charging of a rate unless full value was returned therefor in the transportation furnished. The duty of the Commission as declared by the act is to see that there is equality among shippers and that no rate is made which is unjust and unreasonable when considered with reference to what is done by the railroad in return for the money paid it by the shipper, and outside of this the Commission has no interest or duty with regard to rates.

An examination of the circumstances of the case at bar will show that there is no claim made that the \$5 per ton rate is "unjust or unreasonable" in the sense that too much was asked for the transportation sold. The facts are that in 1899 the railroad penetrated a forest along the Willamette which it did not pay to lumber, because any fair rate which the railroad should charge, would make competition with timber of better quality upon tidewater points impossible. There were practically no mills in the valley. A broad and generous policy was adopted by the railroad which made the lumbermen rich. A low rate was installed, which was

unremunerative to the railroad, for the sole purpose of developing the lumber interests and permitting them to become established on a firm basis and able to compete with tidewater forests. The rate made was most extraordinarily low, when the mountainous character of the road was considered ; the lowest or one of the lowest ever made in the United States (Record, p. 57). It was made with the express purpose of raising it to a fair rate when the lumber interests were established and fully able to pay a proper charge for the service rendered (Record, p. 331). It would have been idle for the railroads to install this low rate for all time to come. That is practically conceded, for the Commission says in its opinion : " We conclude that these defendants ought to maintain *for the immediate future at least*, substantially the same rate which they have maintained in the past " (Rec., p. 25). Now who is to determine the time when the change of rate should be made ? Are the shippers to decide this or is it for the railroad ? If the shippers are to say, then of course the railroad will always have to carry at the unremunerative rate and there never will be any change. As we understand it railroading is still to be re-

garded as a business to be carried on by the officers of the railroad upon common business principles and subject only to an intelligent regulation by the Commission to compel equality in the treatment of shippers and a proper reasonable charge for the work done. Now if the operation of a railroad is still an independent business, it would seem that the time for the change of an unusually low rate (unjust and unreasonable to the railroad considering the service rendered, and made solely to establish a new industry) to a fair and just rate for all concerned was for the railroad to determine and the only possible concern as we look at it which the shippers and the Commission could have in this change is whether the new rate is fair and just in itself.

As was said by Mr. Justice BREWER in *Interstate Commerce Commission vs. Chicago & Great Western*, 209 U. S., 118:

“ It must be remembered that railroads are the private property of their owners ; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality

between shippers and communities, yet *in no proper sense is the public a general manager.*"

Now the result of the broad-minded policy of the railroad was beyond anything which had been believed possible. Two hundred and fifty mills sprang up along the Willamette (Record, p. 118). One of these mills alone cut eighty-two million (82,000,000) feet a year (Record, p. 71). All of them cut about six hundred million (600,000,000) feet a year (Record, p. 118). There are five kinds of rough green lumber referred to and their prices given for 1906 in the record (Rec., p. 385) and their average price for the year 1906 is \$20.10 a thousand. This would make the yearly cut in the Willamette valley worth twelve million one hundred and twenty thousand dollars (\$12,120,000) gross a year to the lumbermen. From nothing in 1899 to a business of twelve million one hundred and twenty thousand dollars (\$12,120,000) gross in 1906. During the same period lumber had about doubled in value. Ought not such an enormous industry to pay a fair and just rate for the transportation of its products to market? Isn't now as good a time as any other

to change the rate to a reasonable charge for the service performed? Must the railroads wait another seven years until the business of the lumbermen has reached twenty-five million dollars (\$25,000,000) a year? Would not the lumbermen object then just as much as now? And if their objections have any force now, would they not have as much force then?

There are some other important changes which took place during the time from 1899 to 1907, which would seem to make the year 1907 as good a year to establish a reasonable rate for carrying the product of the Willamette mills to market as any other. Not only has the price of lumber doubled, but the cost of the operation of the railroad has increased in the same ratio and now the mill owners have an outlet to the east via Portland through which the largest percentage of their product is shipped, while in 1899 their only market was to the south of San Francisco and vicinity. Their business, therefore, in no way depends upon San Francisco and the rate charged to that point (Record, pp. 20 and 21).

That the rate of \$5 per ton is reasonable in itself is admitted in the record by counsel for the lumbermen who said at page 57 :

" COMMISSIONER PROUTY: *That is to say you do not claim the rate is unreasonable in itself?*

" MR. TEAL: *No, I do not.*

" MR. TEAL: You have stated my position exactly. *I am not here complaining about the rates being high or low, because it is a low rate.*"

There is nothing in the opinion of the Commission with reference to the rate of \$5 per ton being too high, and in the dissenting opinion of Commissioner Harlan, he says at page 27 of the Record :

" The \$3.10 rate is conceded to have been a low rate, and I do not understand that the present rate of \$5 is *condemned in the opinion of the Commission as unreasonable in itself.*"

The Commission itself apparently considered that it was sitting as a court of equity. At least the reasons given for its decision give that impression. At page 25 of the Record it says :

" We apply our decision entirely to the facts in the case before us. Considering all the circumstances, having in mind the just interests of all parties, we conclude that these defendants ought to maintain, for the immediate

future at least, substantially the same rate which they have maintained in the past."

What the Commission has in fact done is to determine which business shall have the preference, and it has decided as between the lumber interests and the railroad in favor of the former, although it is conceded by the Commission that the lumber business is enormously profitable and that the value of its product has doubled since the \$3.10 rate first went into effect in 1899; and it is admitted that the railroad of complainants is expensive to operate, that cost of operation on all roads has increased since 1899 and that the rate of \$5 per ton is a just and reasonable rate with reference to the service performed. Is it to be believed that Congress ever intended to place in any administrative body or in any body even if it combined administrative, executive and judicial powers, such extraordinary power to decide as between two business enterprises, which should make a profit and which should not? The very thought of such power being vested in any man or body of men is foreign to American ideas. If this can be done, then why cannot one business be entirely ruined and yet the parties interested have

no redress, if the action of the Commission is not to be reviewed? It is hardly conceivable that we should be seriously arguing the question whether the Commission was authorized to exercise its judgment as to whether the stockholders of a lumber company should have their profits increased at the expense of the stockholders of a railroad. If it was so authorized, then it is open to every business enterprise to attempt to increase its profits at the expense of a railroad.

As everybody knows one of the great objects and purposes of the Interstate Commerce Act was to prevent discrimination and the giving of a preference to one shipper over another. We are now met by the astonishing proposition that, while a railroad is prevented from giving a preference to one shipper over another, it is perfectly proper and within the power of the Interstate Commerce Commission to discriminate in favor of and to give a preference to one class of shippers. No other conclusion can be drawn from the action of the Interstate Commerce Commission in the case at bar. The Commission proposes to compel a railroad to carry lumber for the milling interests of the Willamette Valley at less than a just and reasonable rate

with reference to the service performed, upon the ground that such shippers are entitled to this discrimination because of the establishment by the railroads in 1899 of an unremunerative rate for the purpose of developing the lumber business in the Willamette Valley. All other classes of shippers are required by the Commission to pay a just and reasonable rate *with reference to the service performed*, but this particular class of shippers (lumber men in the Willamette Valley) is permitted by the Commission to pay a rate less than is just and reasonable *with reference to the service performed* because of a supposed estoppel. This, of course, constitutes a preference, and the only possible distinction which can be suggested between this preference and a preference condemned by the Interstate Commerce Act is that the preference given by the Interstate Commerce Commission in the case at bar is to a class and not to an individual. The evil is quite as great, if not greater. An ordinary preference to an individual as against others in the same business is comparatively unimportant when compared to a preference given to a class covering business amounting to over twelve millions of dollars a year. In other

words, the effect of the decision of the Interstate Commerce Commission in this case is to do on a large scale the very thing which the Interstate Commerce Act was designed to prevent.

Suppose that the situation was reversed and that there had been lumber mills and no railroad in the Willamette Valley and that the lumbermen had induced the railroad company to build in the Valley upon the understanding that the railroad should charge a certain rate, and that when the railroad had been built it was evident that the rate was too high, would anybody claim an estoppel in favor of the railroad? Is there any real difference between the present case and the illustration given? Certainly none is apparent, and it merely goes to show that any departure from the plain principle that the rate must be just and reasonable with reference only to the service performed opens the door to controversies that were never intended by Congress to be submitted to the Commission, but are only for the consideration of courts of equity.

In the course of the opinion the Commission says at page 23 of the Record:

“ It is not claimed that the defendants were under contract with any one shipper,

nor with the general body of shippers in that region to maintain the \$3.10 rate. *It is doubtful if such a contract would be valid . . .*"

With this conclusion we agree, and it was so decided by this Court in *Armour Packing Co. vs. United States*, 209 U. S., 56, but what we do not understand is how this case can be in a stronger position than if there had been a contract between carrier and shippers. What is an estoppel? It is an arrangement between parties enforced by a court of equity because of the conduct of the parties. It might perhaps be called a contract or arrangement resulting from conduct. Now if an out and out contract not to do so between shippers and carrier would not prevent the latter from raising a rate, then how is it possible that an estoppel can accomplish this? Further, still, who are the parties to this estoppel? Estoppels are mutual. Certainly a lumberman who opened up a mill in 1906 has no claim of estoppel against the railroad. The country was then developed. The railroad surely owes no obligation to him. On the principle of the decision of the Commission the rate can properly be raised as to him, for it is a reasonable rate in itself. If, however, the

rate is increased as to him, then would be raised the hue and cry of discrimination against him in favor of the other lumbermen. We think the foregoing illustrations fully point out the error of trying to decide cases of rates under general principles of equity and not under the principle declared in the Act that charges must be just and reasonable with reference to the work done and the service rendered.

It is plain that the \$5 per ton rate is a fair rate in itself and has been ordered reduced simply upon the theory that a carrier cannot raise its rates after shippers have been persuaded to invest capital on the strength thereof.

Assuming for a moment that the Commission had the power to place its decision on that ground, yet it is difficult to perceive how any such conclusion could be warranted upon the facts in this case, except on the theory, which has been expressly disowned by the Commission, that a rate once established can never be raised by a carrier no matter what the changed conditions may be. As to this the Commission say at page 25 of the Record:

“ We do not hold, as a general proposition, that a railroad company having estab-

lished and maintained a rate is conclusively estopped from advancing that rate, nor that where a rate is put in for a special purpose it may not be taken out when that purpose has been subserved and new conditions have grown up."

If this theory is abandoned (as it has been) then it is hard to see how there could be any more remarkable change of conditions than is shown in this case between 1899, when the \$3.10 rate was made, and 1907, when it was raised to \$5 per ton, or how there ever could be any combination of conditions which would warrant an increase of a rate, if not found in the present controversy.

In 1899 no lumber mills in the Willamette Valley. In 1907 two hundred and fifty (250) mills cutting six hundred million (600,000,000) feet a year worth in gross over twelve million dollars (\$12,000,000). In 1907 lumber was worth nearly twice what it was in 1899. From 1899 to 1907 the cost of operation of a railroad had increased enormously. Now what should be added to the facts which we have given, in order to warrant an increase of rate. The Commission suggests nothing, and certainly nothing

readily occurs to the ordinary mind. We have a rate unusually low and utterly unfair to the railroad if always to be maintained. The only excuse for its existence was to establish a new industry and then when the mills were on their feet and strong financially to make a rate fair to all concerned, the railroad as well as the shipper. Fostered by this low rate the industry grew almost beyond comprehension. By reason of general conditions the product of the mills doubled in value and the expenses of the railroads increased. We find, therefore, the essential facts to warrant an increase of the low rate made under the peculiar conditions of this case, viz., extraordinary prosperity of shippers and added cost of the service performed by the carriers. We therefore say that even if the Commission was authorized to hold a rate unjust because of certain supposed equities between shipper and carrier, yet such an exercise of that power on the facts before us was error.

We, however, respectfully submit that the Commission was without power to make the order of June 1, 1908, and that the error of assuming that it had such power arose from giving a wrong meaning to the words "unjust or un-

reasonable," found in the 15th section of the Interstate Commerce Act, and from not construing these words with reference to the context, thereby taking to itself the general functions of a court of equity and condemning the rate, not because it was excessive but upon the ground that the carriers were estopped from raising the original rate for the reason that shippers had made investments on the strength of it, and we urge with confidence that Commissioners Knapp and Harlan were right in saying :

" In my judgment we are not warranted, under the act to regulate commerce as amended, in condemning a rate upon such considerations. When preference and discriminations are not alleged, the test of the lawfulness of a rate is whether as a rate for the service offered it is reasonable or excessive " (Record, p. 27).

SECOND POINT.

The situation in this case is not changed by the proceedings in the lower court since the prior argument of the case before this Court in October 1909.

In the opinion of the court below, it is stated that "the pleadings as changed since the cause was last presented to the court no longer raise the point then made that the rates so fixed were below the cost of transporting the lumber" (Record, p. 365). We do not understand that this is so.

The amended bill still contains the following allegations :

"Your orators aver that the rates of \$3.40 and \$3.65 per ton as ordered and prescribed by said Commission were and are unreasonably low rates and will so continue to be during the period fixed for the application of the same by the said Commission and are less than what is and will be during said period just and reasonable for the services rendered, and the said rates do not and will not during said period pay the cost of the service rendered; and that the

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rate of \$5 per ton was, is and will be for the period fixed by said Commission no greater than a just and reasonable rate *for the service rendered* in the transportation of rough green fir lumber and lath from points in the Willamette Valley to San Francisco, California, and Bay points" (Record, p. 45).

The Commission in its answer at page 346 makes this allegation :

"This defendant denies that it did not find the rate of \$5. per ton to be unreasonable and it avers that it did find such rate to be unreasonable and unjust."

Everybody concedes that the Commission did find the \$5 rate "unreasonable and unjust." The point is, however, that the Commission found this rate to be unreasonable and unjust not *with reference to the service performed* ; not because the railroad company did not give full value for the amount received, but because of an estoppel which the Commission says precluded the raising of the rate by the railroad from \$3.10 per ton to \$5. This is the whole controversy, and the allegations in the answer do not deny or in any way dispose of the allegations of the

bill that the rate of \$5 per ton was a just and reasonable rate for the service rendered.

Now, what does the evidence show? Was there anything before the Commission which tended to prove or is there anything in this Record anywhere which tends to prove that the rate of \$5 per ton is unjust or unreasonable *with reference to the service performed?*

R. B. Miller, a witness produced on behalf of defendants in the proceeding before the Interstate Commerce Commission, was the General Freight Agent of the lines of the Southern Pacific Company in Oregon, and was familiar with the business of the Southern Pacific Company since his first connection with it in 1899 (Record, pp. 154, 155). At page 191, he was asked as to the justness and reasonableness of the \$5 rate with reference to the service performed by the railroad company, and testified as follows:

“ COMMISSIONER PROUTY : Was it your idea, Mr. Miller, that the industry can get along without that rate? Is that the theory on which you withdrew it, that it was an infant industry in 1899, and has become old enough to go alone now?

"MR. MILLER : Yes, sir.

"COMMISSIONER PROUTY : You think this rate is not necessary to that industry at the present time ?

"MR. MILLER : No sir.

"COMMISSIONER PROUTY : If it were, would you keep it in ? Suppose the Commission is of the opinion that it is, ought the Commission to keep it in ?

"MR. MILLER : Of course that is a difficult question to answer, not having all of the circumstances and conditions surrounding the business before us. I couldn't answer that question until I knew just what the conditions might be, not only with respect to the lumber traffic itself but with respect to the general conditions existing in that territory.

"MR. COTTON : You do not intend to reduce the lumber business in the Willamette Valley to nothing and prostrate it ? You have no idea of destroying it, have you ?

"MR. MILLER : Why, decidedly not.

"MR. COTTON : You do regard the present lumber rate, though, that is the \$3.10 rate, as an unreasonably low rate ?

"MR. MILLER : Yes sir.

"MR. COTTON : You think it can stand a higher rate ?

" MR. MILLER : Yes sir.

" MR. COTTON : And do you regard \$5 as a high rate for the services performed ?

" MR. MILLER : *I regard \$5 as a low rate for that service under the circumstances and conditions.*

" MR. COTTON : *Is that a low rate as compared with other rates, which you are charging on traffic from which you are making your revenue in that territory ?*

" MR. MILLER : *It is very much lower."*

There was no testimony introduced by the lumbermen to show that the \$5 rate was unjust and unreasonable *with reference to the service performed.*

Aside entirely from the proposition that the evidence from one end of this Record to the other shows nothing which would indicate that the \$5 rate per ton was unreasonable and unjust *with reference to the service performed*, we also find that an examination of the proceedings before the Commission and of the opinion of the Interstate Commerce Commission discloses that throughout the entire proceeding, neither the parties, nor their counsel, nor the Commission itself, supposed that the reasonableness or the unreasonableness of the \$5

rate with reference to the service performed was in issue. It was assumed that such rate was reasonable with reference to the service performed. In other words, the whole controversy hinged on the proposition that the rate was in the opinion of a majority of the Commission unreasonable and unjust, not with reference to the service performed, but because of the estoppel arising by reason of the capital invested in the lumber business in the Willamette Valley as a result of the \$3.10 per ton rate put in effect in 1899.

If the lumbermen and their counsel had believed this to be an unreasonable rate with reference to the service performed and that what the railroad did in the transportation of this lumber was not a full equivalent for the money paid, would Mr. Teal, representing his clients, have made the following answers at page 57 of the Record:

“ COMMISSIONER PROUTY: Let me ask you, Mr. Teal, this question. Suppose that rate had never been lower than 25 cents a hundred pounds, which is \$5 a ton, would you claim that this Commission to-day ought to reduce that rate ?

" MR. TEAL : No, I don't think I would.

" COMMISSIONER PROUTY : *That is to say, you do not claim the rate is unreasonable in itself ?*

" MR. TEAL : *No, I do not.*

" COMMISSIONER PROUTY : You put your case entirely on the ground that these people represented to your clients and to other mill men in the Willamette Valley that they would establish this lower rate for the purpose of building up the industry in that valley ; that the industry cannot exist there in competition with other sections unless that rate is maintained in effect ?

" MR. TEAL : Yes, sir.

" COMMISSIONER PROUTY : And therefore the railroad is obliged to maintain it in effect ?

" MR. TEAL : It has been maintained for eight or nine years. You have my position exactly, Mr. Commissioner.

" COMMISSIONER PROUTY : That simply shows that it has been maintained and industries have grown up ; that the railroad company has, during that period, elected to maintain it, and found it profitable, probably ?

" MR. TEAL : You have stated my posi-

tion exactly. I am not here complaining about the rates being high or low, *because it is a low rate.*"

In his last answer just quoted, when Mr. Teal says "*because it is a low rate,*" he was referring to this \$5 rate per ton, and it is out of the question that he should have been willing to state to the Commission that this \$5 rate was a low rate if he thought and supposed that such rate was unreasonable and unjust *with reference to the service performed.*

Mr. Teal does not make this statement once only, but he again emphasizes his opinion that the \$5 rate per ton is a low rate, for he says at page 62 as follows :

"COMMISSIONER PROUTY: That seems to be your case, Mr. Teal. If they can, there is no reason from your statement why the rates should be reduced, *because you say the rate is low enough*, unless those men have been induced to build their mills there, and ought to be protected.

"MR. TEAL: That is correct."

Now when counsel made the opening statement for the railroads, he clearly and specifically

asked Mr. Teal, the counsel for the lumbermen, whether it was his understanding that the \$5 rate was a just and reasonable rate in and of itself; that is to say, a reasonable rate with reference to the service performed, and again counsel for the lumbermen conceded that it was. As to this it was said at page 63 :

" MR. COTTON: I understand Mr. Teal takes the position and therefore we will proceed upon that theory that this \$5 rate is not an unreasonable rate in and of itself. That is my understanding. Is it yours?

" MR. TEAL: Yes, I think I would say that.

" COMMISSIONER PROUTY: Mr. Teal says if the \$5 rate had been in effect for the last ten years he would not ask us to reduce it. It may be they have made a profit. That probably is so; but he does not claim it is an unreasonable rate."

Now it is certain that in his own opening, and upon the opening of this proceeding for the railroad, the counsel for the lumbermen took the position that the \$5 rate was not an unreasonable rate *with reference to the service performed*. It is immaterial that subsequently Mr. Teal un-

dertook to limit and qualify his clear admission of this fact. The qualification and limitation mean nothing in view of the fact that in the course of the proceeding, Mr. Teal never undertook by any testimony of witnesses or by any documentary evidence to show that the rate of \$5 per ton was unjust or unreasonable *with reference to the service performed*.

Just before the beginning of the testimony, Commissioner Prouty asks this question of Mr. Teal at page 69 of the record :

“ COMMISSIONER PROUTY : . . . They have a rate to the east. For what reason is not that rate as valuable to them as it is to Portland and other mills, and to what extent is it necessary that this rate should be maintained to San Francisco in order to fairly continue the prosperity of these establishments ?

“ MR. TEAL : That is where I intend to confine my testimony.”

In other words, Mr. Teal makes the statement to the Commission that he intends to confine his testimony to the question—whether the \$3.10 rate should be maintained in order to continue the prosperity of the mills. He is as good as

his word, and nowhere in the record does he undertake to show that the \$5 rate is unjust and unreasonable *with reference to the service performed*, but the evidence introduced by him is all directed to showing the \$5 rate unjust and unreasonable because the mills have been established on the faith of the \$3.10 rate and that therefore such rate should be continued.

It is apparent that everybody understood that the evidence of Mr. Teal would be confined to this one question, and that he would not undertake in any way to show that the \$5 rate was unjust and unreasonable with reference to the service performed. This is shown by the general objection to this entire line of testimony made by counsel for the railroad companies, at page 69 of the Record, where he said :

“MR. DILLARD: In order that we may get it in the record,—I do not know that it will be necessary at all—I desire at this time to interpose a special exception and objection to the introduction of any testimony on that line, on the grounds that if the rate is reasonable, the railway company has the right to make it, irrespective of what might be the effect of it ; second, that there can be no estoppel upon a railroad from

making a reasonable rate, irrespective even of the fact, if it were a fact, that a contract had been entered into that the rate would not be changed; that the matter of making rates must be determined by the conditions as they exist at any given time by the law then in force; that any contract, if there were a contract theretofore made, could have no effect, and that the evidence proposed to be introduced is in all respects irrelevant and immaterial. I presume, of course, the evidence will be admitted, but I want to make the objection at this time in this way, that I may not seem to be interrupting the counsel.

“COMMISSIONER PROUTY: The evidence will all be received subject to the objection of Mr. Dillard. Of course, in overruling the objection and receiving the evidence, the Commission expresses no opinion upon the question involved, but that evidence seems to be pertinent to Mr. Teal’s claim.”

After the case was opened before the Commission and throughout the testimony there appears from time to time a statement of some member of the Commission as to what he considers the issue being tried. At page 92 of the Record, in answer to counsel for the railroad as

to what the basis of the claim of the lumbermen was, Commissioner Prouty makes this statement :

“ COMMISSIONER PROUTY: Oh, no, the whole basis of his claim is that you have put in a rate and he built his mill on the strength of that rate and is entitled to his rate. If he made a good trade he is entitled to that.”

Again, at page 96, Commissioner Prouty asked one of the witnesses as follows :

“ COMMISSIONER PROUTY : So that really you did not expect that rate to last forever, but as long as conditions were the same ? ”

At page 117 of the Record, the question before the Commission is again stated as follows :

“ COMMISSIONER PROUTY : I do not think Mr. Booth testified to any understanding which could be regarded in the light of a contract or in estoppel or anything of that sort, except in so far as the railroad company which puts in effect and maintains in effect a certain rate may be held to be in a sense estopped or excluded from changing

that rate after an industry has been built up and strengthened."

Subsequently, at page 132 of the Record, in a controversy between the Commission and counsel as to the line of evidence introduced in the case, Commissioner Prouty says :

" COMMISSIONER PROUTY : That general fact is important ; but not the fact that this individual member did that perhaps. He is not standing here asking us to enforce some contract with the Southern Pacific road, and he is not asking that the Southern Pacific road be estopped from putting in this rate as to him in particular. *The simple question here is what is the fair thing to be done with reference to these mill owners.*"

Towards the end of the case Commissioner Prouty, at page 192 of the Record, in speaking of the question of the change in the rate from \$3.10 per ton to \$5 per ton, says :

" COMMISSIONER PROUTY : Mr. Teal, it is a very important situation in this case as to how far the Southern Pacific may consult its own judgment in these matters and as to how far that judgment can be controlled by the Commission. That is the thing for you gentlemen to argue."

The foregoing quotations from the record in this case show beyond question that the only matter considered by the Commission was whether this \$5 rate was unjust and unreasonable because of the establishment of the lumber industries in the Willamette Valley on the faith of the \$3.10 rate. That is to say, no question as to the justice of the \$5 rate *with reference to the service performed* was considered to be before the Commission.

This view of the matter is further strengthened by the opinion of the Commission itself, which is prefaced by the following syllabus:

“ 1. Where a rate has been established and maintained for a considerable period for the purpose of developing a particular industry and with full knowledge that the industry could not be developed without it, and where, under the influence of such rate, large amounts of money have been invested in property the value of which must be seriously impaired by an advance of the rate, that fact is an important consideration in passing upon the reasonableness of such advance.

“ 2. The Southern Pacific Company established a rate of \$3.10 per ton upon rough

green fir lumber and lath from points in the Willamette Valley to San Francisco for the purpose of developing the lumber industry in that section, and maintained the rate in effect, with a brief interval, for six years; and on the strength of this rate that industry attained considerable proportions. In April, 1907, this rate was advanced to \$5 per ton; Held, that the advance was unreasonable and that the rate ought not for the future to exceed \$3.40 per ton."

There is no doubt but that the syllabus of the Report of the Commission correctly states what was decided in the body of the decision. There is nothing in the report which indicates in any way that the Commission was of the opinion that the \$5 rate was in and of itself unjust and unreasonable *with reference to the service performed*.

It is true that at the conclusion of the Report, the Commission does say :

"We are of the opinion then that the present rate of \$5 from all mills in the Willamette Valley not including Portland is unjust and unreasonable" (Record, p. 26).

But as we have before pointed out with reference to the allegation in the answer of the Com-

mission upon this point, the Commission has been very particular not to say that this rate was unjust and unreasonable *with reference to the service performed*.

Moreover this quotation is every word that the Commission says in its report with reference to the reasonableness and justness of the \$5 rate. The expression of the Commission at page 22 of the Record, "that the \$3.10 rate was certainly a low one, but we are satisfied that it yielded when established, that it has always yielded, and would in the future yield a substantial return over and above the cost of operation, and that its maintenance in the past has contributed much to the prosperity of the defendants," is not inconsistent with the statement which we now make that nowhere in the report does the Commission object to the rate of \$5 as being unreasonable and unjust *with reference to the service performed*.

Our construction of the Report of the Commission is certainly confirmed by the dissenting opinions of Messrs. Harlan and Knapp, who say that they—

"do not understand that the present rate of \$5 is condemned in the opinion of the

Commission as unreasonable in itself and apart from the matters of estoppel on which the opinion seems largely to rest" (Record, p. 27).

It may be now contended by the Government that even if the report and finding of the Commission cannot be sustained for the reasons given, yet it can be upheld because as a matter of fact the rate of \$5 is unreasonable and unjust *with reference to the service performed*. The difficulty with this is that no evidence has been introduced upon the subject, except the evidence of the railroads that it is a just and reasonable rate for the service performed (Record, p. 191). In the absence of any evidence how is it possible for this Court to so find? Further than that how can this Court, at this late day, be seriously asked by the Government to now find the \$5 rate unreasonable and unjust *with reference to the service performed* when the allegation of the amended bill that "the rate of \$5 per ton was, is and will be for the period fixed by the Commission no greater than a just and reasonable rate for the service rendered" (Record, p. 45) was never denied by the Government in the answer of the Interstate Commerce Com-

mission. The Commission does say in its answer that it "denies that it did not find the rate of \$5 per ton to be unreasonable, and avers that it did find such rate to be unreasonable and unjust" (Record, p. 346), but it was most careful not to say that it found the rate unreasonable *with reference to the service performed*. Everybody knows that the Commission held the rate unreasonable, but upon the sole ground of the large amount of capital invested by the lumber mills on the strength of the \$3.10 rate. If the Commission had not the courage to deny in its answer that the rate was reasonable and just *with reference to the service performed*, how can it have the assurance to ask this Court to find without any evidence before it that the \$5 rate was unjust and unreasonable *with reference to the service performed*.

Our position further is that the Commission is obliged to stand on its order and the reasons given by it therefor. The carrier is alone given the right by the Interstate Commerce Act to bring a proceeding to set aside or modify the Commission's order. It is therefore not open to the Government to now come in and dispute the question of the reasonableness of the \$5 rate when in the entire proceeding before the Com-

mission it was conceded that the rate was in and of itself just and reasonable. That is to say the Government must stand on the order of the Commission and the reasons given by the Commission therefor.

It may be that the Government will take the position that the rate ordered by the Commission is not confiscatory and that therefore it cannot be reviewed in any way in the courts. As we look at it, the words "confiscation" and "confiscatory" are simply confusing, and do not help in any way in the determination of what is or what is not a matter of investigation by the courts. There are no such words in the federal constitution, nor in any federal statute. The provision of the constitution is that no man shall be deprived of his property without due process of law. The property of the individual cannot be taken from him for a public purpose without just compensation, no matter how small in value it may be, and no matter how great his remaining wealth. All that is necessary is that something which is his property should be taken from him for a public purpose without just compensation and therefore without due process of law in order that he may come within the protection of the con-

stitution. The individual is in no better position than the corporation. They stand so far as the provisions of the constitution go upon the same ground and if property of a carrier is taken from it without just compensation, and therefore without due process of law, it is utterly unimportant as to the extent of this property so taken. If a carrier is not permitted to charge a rate which is just and reasonable *with reference to the service performed*, then its property is taken from it contrary to the provisions of the Constitution. That the extent of such deprivation is such as to create a confiscation of its property is unimportant. The single question is whether its property is taken without due process of law, and if it is, then it comes within the prohibition of the Constitution.

Some theory may be advanced as to the railroad company making a profit from its general business, and that therefore a reduction of the \$5 rate necessarily does not result in the confiscation of the property of the railroad. We do not understand that this theory has ever received the approval of this Court. On the contrary, we understand that it has received the disapproval of this Court in the case of *Cotting vs. Kansas City Stock Yards*, 183 U. S., 79.

The claim is illogical and if consistently followed leads to absurd conclusions. If a rate which is less than a just and reasonable rate *with reference to the service performed* is to be deemed not confiscatory and not a violation of the provisions of the constitution simply because the whole business of the carrier yields a profit, then it would necessarily seem to follow that a rate which was utterly unfair and unjust and exorbitant when considered with reference to the services performed must be considered a proper rate if on its entire business the railroad is losing money. If one position is correct then the other must be also. This whole subject was fully discussed in the *Cotting Case*, *supra*, and the view now suggested by the Government was dismissed by this Court as being too narrow. At page 95, Mr. Justice BREWER speaking for the Court says :

“Pursuing this thought, we add that the State’s regulation of his charges is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, *considering the service rendered*, an un-

reasonable exaction. In other words, if he has a thousand transactions a day and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because by reason of the multitude the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but *whether in each particular transaction the charge is an unreasonable exaction for the services rendered.* He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large. Such was the rule of the common law even in respect to those engaged in a quasi public service independent of legislative action. In any action to recover for an excessive charge, prior to all legislative action, who ever knew of an inquiry as to the amount of the total profits of the party making the charge? Was not the inquiry always limited to the particular charge, and whether that charge was *an unreasonable exaction for the services*

rendered? As was said by Mr. Justice BRADLEY, in *Transportation Co. v. Parkersburg*, 107 U. S., 691, 699:

“ ‘It is also obvious that since a wharf is property and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf and are required to pay the regular charges therefor; provided, always, that the charges are reasonable and not exorbitant.’

“ ‘In *Canada Southern Railway Co. v. International Bridge Co.*, 8 App. Cas., 723, 731, Lord Chancellor SELBORNE thus expressed the decision of the House of Lords:

“ ‘It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, *but what it is reasonable to charge to the person who is charged.* That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that

of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their Lordships asked counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when *examined with reference to the service rendered* and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so, it seems to their Lordships that it would be a very extraordinary thing indeed, unless the legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are

still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned judge in the court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to 15 per cent. *Their Lordships can hardly characterize that argument as anything less than preposterous.*

“ The authority of the legislature to interfere by a regulation of rates is not an authority to destroy the principles of these decisions, but simply to enforce them. Its prescription of rates is *prima facie* evidence of their reasonableness. In other words, it is a legislative declaration that such charges are reasonable compensation for the services rendered, but it does not follow therefrom that the legislature has power to reduce any reasonable charges because by reason of the volume of business done by the party he is making more profit than others in the same or other business. The question is always not what does he make as the aggregate of his

profits, *but what is the value of the services which he renders to the one seeking and receiving such services.* Of course it may sometimes be, as suggested in the opinion of Lord Chancellor SELBORNE, that the amount of the aggregate profits may be a factor in considering the question of the reasonableness of the charges, but it is only one factor, and is not that which finally determines the question of reasonableness. Now, the controversy in the Circuit Court proceeded upon the theory that the aggregate of profits was the pivotal fact. To that the testimony was adduced, upon it the findings of the master were made, and in recognition of that fact the opinion of the court was announced. Obviously, as we think, in all this the lines of inquiry were too narrowly pursued."

We know of no subsequent decision which in any way conflicts with the views of Mr. Justice BREWER expressed in his discussion of this question in the *Cotting Case*.

We therefore submit with confidence that the case now presented on the merits is precisely the same case which was argued before this Court in October, 1909. The proceedings in the court below have made no change. It appears now as

then that, taking the whole record, there is no question but that the Interstate Commerce Commission held the \$5 rate to be unreasonable and unjust solely upon the ground that it was unfair to the lumber mills after the investment of capital on the faith of the \$3.10 rate to raise the rate to \$5. It is not possible to gather from the record that the Commission ever considered the question of the reasonableness or unreasonableness of the \$5 rate *with reference to the service performed*. Even if it was open to the Commission to sustain its order upon grounds other than those given for its decision, yet it is impossible so to do unless somewhere in the record there can be found something to sustain the new grounds offered. No such evidence appears in the testimony. In the Report of the Commission, and in its answer to the bill of complaint herein there is nothing to show that the Commission deemed the \$5 rate unreasonable and unjust *with reference to the service performed*. Therefore the single question before this Court is whether the Interstate Commerce Commission has the power under the Commerce Act to hold a rate unreasonable and unjust solely upon the equitable ground of estoppel.

THIRD POINT.

The expiration of the order of the Commission before the argument of this case does not require the dismissal of this case upon the ground that it has become a moot question.

This question has been fully argued in the Fifth Point of the Notes of Argument filed in behalf of the appellants in Cases No. 459 and No. 460 on the docket of this Court, which have been set for argument just prior to this case, to which the Court is respectfully referred, and for the reasons there given we think that this Court should not dismiss this appeal.

FOURTH POINT.

The judgment of the Court below should be reversed.

MAXWELL EVARTS,
F. C. DILLARD,
Counsel for Appellants.



In the Supreme Court of the United States.

OCTOBER TERM, 1910.

SOUTHERN PACIFIC COMPANY AND ORE- gon and California Railroad Company, appellants,	} No. 527.
<i>v.</i> INTERSTATE COMMERCE COMMISSION.	

*APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA.*

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

This appeal is from a decree of the Circuit Court of the United States for the Northern District of California, dismissing the bill of complaint of the railroads and sustaining an order of the Interstate Commerce Commission with respect to rates for the carriage of certain grades of lumber from points in the Willamette Valley, Oregon, to San Francisco.

The same case was here at the last term of this court on the certificate of the judges of the court below that they were divided in opinion as to whether

the demurrer of the Interstate Commerce Commission to the bill of complaint of the railroads should be sustained (Rec., 53), and this court dismissed the certificate and remanded the case to the Circuit Court for further proceedings on the ground that notwithstanding the provisions of the so-called expediting act of February 11, 1903 (32 Stat., 823, there was no authority for certifying the whole case to this court without the rendition of any judgment, opinion, or decision below. (*So. Pac. Co. v. Interstate Commerce Com.*, 215 U. S., 226.)

In obedience to the mandate of this court (Rec., 362) further proceedings were had in the court below; the demurrer of the Interstate Commerce Commission was, by leave of court, withdrawn (Rec., 374); a demurrer and answer on behalf of the Commission was filed (Rec., 335-346); a replication to such answer was made (Rec., 361); and, finally, the court, coming to hear the case upon the bill of complaint, the answer, the replication, and the proofs, dismissed the bill and entered a decree for the Commission (Rec., 364). The opinion below was unanimous and appears in full in the record (p. 365-374).

The chief difference between the case as presented at the first hearing below, when the judges were divided in opinion, and as finally considered, when the unanimous judgment was rendered in favor of the Commission, which is now here for review, is that on the first hearing the railroads alleged in their bill of complaint that the rates fixed by the Commission

would not pay the cost of the service rendered (Rec., 45), and to this, among other allegations, the Commission demurred (Rec., 51, 52), whereas at the last hearing this demurrer was withdrawn and an answer filed expressly denying that the rates fixed by the Commission would not pay the cost of the service rendered and averring that the rates so prescribed are just and reasonable, are fully remunerative to the railroads and produce a fair return for the service performed (Rec., 345, 346).

THE ISSUES INVOLVED.

It is not necessary to enter upon a detailed history of this controversy. The salient questions in the case may be very briefly stated.

In 1899 the Southern Pacific and the Oregon and California railroads fixed a rate of \$3.10 per ton for the transportation of all kinds of lumber from the Willamette Valley and Portland to San Francisco and bay points. In 1903 they advanced the rate to \$5 per ton. In 1904 they restored the rate to \$3.10 per ton, upon rough green fir lumber and laths only, from the Willamette Valley to San Francisco. In 1907 they again advanced the rate to \$5. A complaint was filed with the Interstate Commerce Commission by the Western Oregon Lumber Manufacturers' Association and others against the Southern Pacific and Oregon and California railroads, and the Commission, after a full hearing, made an order in June, 1908, fixing a rate not to exceed \$3.40 per ton for the transportation of green fir lumber and laths,

in carloads, from points on the east bank of the Willamette River and upon the west bank south of Corvallis, and a rate not exceeding \$3.65 per ton for such transportation from points on the west bank of said river north of Corvallis to San Francisco and bay points.

The railroads complain of this order on three grounds:

First. That the Interstate Commerce Commission was without authority to fix any rates whatever;

Second. That the Commission did not establish the new rates because the old rate was unreasonable or because the new rates were reasonable, but simply because the railroads had promised and long maintained a lower rate; and

Third. That the rates established by the Commission are asserted by the railroads to be unreasonably low, unremunerative, and even below the cost of service.

Under the first objection, that the Commission was without authority to establish any rate, the railroads contend that the interstate-commerce act is unconstitutional in that it delegates legislative power to the Commission; unites in one body legislative, judicial, and executive functions; imposes penalties so severe as to amount to a deprivation of property without due process of law; and, finally, that the fixing of a rate is not a regulation of interstate commerce. Our answer is that the validity of the interstate-commerce act in all these particulars is fully sustained by decisions of this court.

Under the second objection, that the Commission prescribed these rates without regard to reasonableness and simply on some equitable principle of estoppel between the railroads and the shippers, counsel for the appellants pick out various observations of members of the Commission who heard the case, statements of counsel for the complainants, and certain language in the opinion of the commissioner who wrote the report, contending from these circumstances that the only reason which influenced the Commission in reducing the rate was that the railroads had induced numerous lumber manufacturers to set up their mills and industries in the Willamette Valley upon the faith of the \$3.10 rate, originally established by the carriers; to invest hundreds of thousands of dollars in such enterprise and to purchase thousands of acres of timber land, yielding annually many millions of feet of lumber; and that for the railroads subsequently to raise this rate to \$5 and thus completely to destroy the business of the shippers, was so unfair as to justify the restoration of some rate under which the business could continue.

Our answer to this is that no expressions in the opinion of the Commission can be used to defeat its order if its order is otherwise lawful; that the power of the Commission to make an order reducing rates can not be affected by the fact that its order would also secure the establishment of rates which the railroads themselves were under a moral obligation to maintain; and finally, that the Commission in its report and order expressly finds from the evidence

that, independently of any promise on the part of the railroads, the \$5 rate is unjust and unreasonable and the rates of \$3.40 and \$3.65, respectively, as prescribed by the Commission, are just and reasonable and will afford a fair return to the carriers.

As to the third objection, that the rates established by the Commission will not produce a fair return or will require a service below cost, our answer is that this is merely the assertion of the railroads. It is contrary to the express finding of the Commission; it is specifically denied in the Commission's answer, and there is no testimony whatever in the record either proving or tending to prove such an allegation.

ARGUMENT.

Before discussing the merits of this case, the attention of the court ought to be called to the fact that the order of the Commission here involved expired on August 15, 1910, two years after the order was made effective (Rec., 35), or at the latest, October 15, 1910, two years from the postponed date at which the order was made to go into effect (Rec., 36).

There being no order of the Commission now in force, and nothing upon which the judgment of this court could operate, this appeal presents merely a moot question, and should be dismissed.

Mills v. Green, 159 U. S., 651.

California v. Railroad, 149 U. S., 308.

San Mateo v. Railroad Co., 116 U. S., 138.

Little v. Bowers, 134 U. S., 547.

Board v. Glover, 160 U. S., 170.

Pennsylvania v. Bridge Co., 18 How., 421.

Dinsmore v. Southern Express Co., 183 U. S., 115.

Jones v. Montague, 194 U. S., 147.

Richardson v. McChesney, No. 23, this term, decided November 28, 1910.

That the expiration of an order of the Interstate Commerce Commission pending proceedings in the courts brought to set aside the order, presents merely a moot case, is more fully discussed in the brief for the Interstate Commerce Commission in cases Nos. 459 and 460 of this term. (*Southern Pacific Terminal Co. et al. v. Interstate Commerce Commission et al.* and *E. H. Young v. Interstate Commerce Commission.*)

Coming now to discuss the merits of the case, we propose to consider:

First. The power of the Commission to fix rates.

Second. The reasons which influenced the Commission in fixing these rates; and

Third. The assertion of the railroads that the rates fixed are unreasonable or below the cost of service.

FIRST.

As to the power of the Interstate Commerce Commission to fix rates.

A large part of the assignment of errors relied upon by the railroads in this case challenges the power of the Interstate Commerce Commission to fix any rates whatever (Rec., 388, 389, 390); maintaining that the interstate-commerce act is unconstitutional; that the fixing of a rate is not a regulation of commerce;

that the act delegates legislative power to the Commission; that it unites in one body legislative, judicial, and executive functions; and, finally, that the penalties imposed by the act are so severe as to amount to a deprivation of property without due process of law.

We shall not reargue these questions. They are all now settled by the decisions of this court.

That Congress itself may fix interstate railroad rates follows inevitably from the decision in *Gibbons v. Ogden* (9 Wheat., 1), and is expressly asserted in many cases. (*Wabash, etc., R. R. Co. v. Illinois*, 118 U. S., 557; *Phila. S. S. Co. v. Penn.*, 122 U. S., 326; *Northern Securities case*, 193 U. S., 197, 368.)

That the fixing of a rate is a regulation of interstate commerce is not open to dispute. (*Maximum Rate cases*, 167 U. S., 479; 162 U. S., 184; 162 U. S., 197; *Smyth v. Ames*, 169 U. S., 466; *Wabash R. R. Co. v. Ill.*, 118 U. S., 557.)

That Congress may confer upon a commission power to ascertain what rate as a maximum will be just and reasonable and to prescribe and enforce that rate is now conceded.

Missouri River Rate Cases (*Interstate Commerce Com. v. C., R. I. and P. Ry. Co.*, and *Same v. C., B. and Q.*, 218 U. S., 88, and 218 U. S., 113; *Interstate Commerce Com. v. Stickney*, 215 U. S., 98; *Interstate Commerce Com. v. C., N. O. and T. P. Ry. Co.*, 167 U. S., 479, 494).

That the power thus exercised by the Commission does not constitute the usurpation of legislative or

judicial functions, or unite in one body conflicting governmental authority, but consists merely in the ascertainment of facts upon which operates the general rule of Congress prescribing just and reasonable rates, is now fully established by cases in which the same or similar questions were involved. (*St. Louis, Iron Mt. and So. Ry. Co. v. Taylor*, 210 U. S., 281; *Railroad Commission Cases*, 116 U. S., 307; *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S., 362; *Field v. Clark*, 143 U. S., 693; *Buttfield v. Stranahan*, 192 U. S. 470; *Union Bridge Co. v. United States*, 204 U. S., 364.)

That the penalties imposed by the interstate-commerce act do not amount to a deprivation of property because, first, no penalties are sought to be recovered in this case. and, second, the penalty provision is separable from the remainder of the statute, is fully sustained in the *Commodities Clause Cases* (213 U. S., 366, 417), where a similar penalty clause was examined.

SECOND.

As to the reasons which influenced the Commission in fixing the rates.

The real gist of the railroads' complaint in this case is that the Commission heard testimony as to the circumstances under which the old rate of \$3.10 had been established by the carriers and maintained for several years and, after being once increased and again restored, was finally supplanted by the new \$5 rate which the shippers made the subject of their appeal for relief.

The railroads claim that the Commission took nothing into consideration except the railroads' course of conduct toward the shippers, and having found that this was not characterized by good faith, concluded that the shippers were entitled to a reduction in rates.

There is no merit in this contention, and the Circuit Court, after a full examination of the proceedings before the Commission, rejected such a claim as not justified by the facts. The court below says:

In the case in hand, the main point relied upon by the counsel for the complainants at the bar was that it appears upon the face of the findings and decision of the Commission itself that it did not fix the rate of \$3.40 on the lumber in question as a reasonable rate, in and of itself, but only as a reasonable rate in view of the conduct of the railroad company, under and by reason of which the complainants established their mills and produced the traffic. *We do not so interpret the findings and report of the Commission.* (Rec., 365.)

Then, after reviewing the report of the Commission at length the court below says that, while it appears that the Commission considered the conduct of the railroads under which the lumber men had developed their industry in the Willamette Valley,

The Commission * * * by no means limited the basis of its decision to the past action of the railroad companies. (Opinion of the court below, Rec., 371.)

Finally, the Circuit Court, summing up the proceedings and findings before the Interstate Commerce Commission, declares that the Commission—

expressly found that the old rate of \$3.10 established by the railroad company paid an average return to it of about five mills per ton mile, and that while that rate was a low one, it did yield when established, has ever since yielded, and would for the future yield, a substantial return over and above the cost of operation. (Rec., 373.)

Then the court concludes as follows:

In view of that finding, we can not say that its increased rate to \$3.40 per ton is so unreasonable as to come within any inhibition of the Constitution of the United States. (Rec., 373.)

This unanimous opinion of the Circuit Court expresses the view that will at once commend itself to any one who examines these proceedings before the Interstate Commerce Commission.

It is true that the complaining shippers urged a special grievance in the fact that they had been induced by the promise of the railroads, when the \$3.10 rate was established, to build their mills and locate their industries along the line of these roads in the Willamette Valley; that the railroads had for many years maintained this rate, and that suddenly to increase it to \$5 per ton would completely destroy their business. It is true that the Commission heard these circumstances recited, and listened to statements from both sides on the subject. It is

true also that some members of the Commission thought that this breach of faith on the part of the railroads was not fair to the shippers.

But it is not true that the Commission based its findings, or the rates it prescribed, upon these facts, for, independently of every other consideration, the Commission, as we shall presently show, expressly found that the old rate of \$3.10 per ton established and maintained for several years by the railroads, was, although low, in itself sufficient to afford a profit to the railroads; that the \$5 rate substituted by the railroads was unreasonable for the service performed, and that the \$3.40 and \$3.65 rates, respectively, prescribed by the Commission, were just and reasonable and produced a fair, remunerative return for the transportation.

Inasmuch as the only point really insisted upon by the appellants in this case is that the Commission gave a wrong reason for its action, it seems proper to consider this branch of the case in detail. We submit, therefore, these propositions.

- (a) **No expressions in the opinion of the Commission can be used to defeat its order if the order is otherwise lawful.**

Appellants seem to assume that the judicial review of orders by the Interstate Commerce Commission constitute the courts appellate tribunals, and that if the court finds that the Commission admitted some testimony that the court would not have admitted, or adopted some method of inquiry which the court would not have adopted, then the rate prescribed by

the Commission must be set aside, even though it does not appear that there was no evidence before the Commission to justify its action, and even though it does not appear that the rate prescribed was so unreasonable as to deny constitutional rights of property. There is no justification for such a view of the independent provinces of the Commission and the court.

In no case does it appear that an order of the Commission otherwise lawful would be set aside by the court simply because of the expressions of opinion or of views by the commissioner writing the report, whether such views are sound or unsound. On the contrary in the only case in which this court directly considered the weight to be given to reasons assigned by the Interstate Commerce Commission for its orders it expressly held that if an order was otherwise lawful the court would enforce it, even though the Commission gave a wrong reason for it.

In *Southern Pacific Co. v. Interstate Commerce Com.* (200 U. S., 536) the court say at pages 556, 557:

We think that the court was not confined to those grounds [assigned by the Commission], and if it found the rule was, in itself, for any reason illegal as a violation of the act, the order might be valid and be a lawful order, *although the Commission gave a wrong reason for making it.* * * * All the facts being brought out before the Commission or the court, the court could decide whether the order was a lawful one, without being confined to the reasons stated by the Commission.

Of course if the Interstate Commerce Commission should make an order fixing maximum rates upon the sole basis of facts not related in any way to the reasonableness of the rates considered, it might be contended that it was beyond the scope of its power, even though the rates prescribed were not violative of constitutional rights; but where it appears not only that the rates fixed by the Commission were found to be just and reasonable within the constitutional protection, but that the Commission found the rates established by the carrier to be unjust and unreasonable, after a hearing in which testimony was adduced to support such a finding, independently of every other consideration, then it would seem clear that even if among the reasons given for its finding a wrong one should appear the court will not set aside the order.

It must be remembered that the Interstate Commerce Commission is not a court. It is not governed by technical rules of law with respect to the admission of evidence. (*Interstate Commerce Com. v. Baird*, 194 U. S., 25, 44.) By section 13 of the interstate-commerce act as amended, where a complaint is made, it is provided that—

It shall be the duty of the Commission to investigate the matters complained of *in such a manner and by such means as it shall deem proper.*

It becomes, therefore, unimportant what testimony is introduced before the Commission or what opinion is expressed by the member writing the report so

long as it appears that a hearing was granted upon the question of the reasonableness of the rates involved and some testimony was adduced upon that subject and a finding made that the rates in effect were unreasonable and the rates prescribed were reasonable.

The function of rate making is legislative in character. When a rate is fixed by the Commission it becomes, as Mr. Justice Miller said in *Chicago, Milwaukee and St. Paul R. R. Co. v. Minn.* (134 U. S., 418), "the law of the land" with the same force and efficacy as if the very figures in the Commission's order were written into the statute.

The chief function of the court, therefore, is to consider not the method by which the result was reached, but whether or not the rate prescribed is so low as to contravene the constitutional provisions for the protection of property.

As Mr. Justice Harlan said in *San Diego Land Co. v. National City* (174 U. S., 739)—

Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for a public use (p. 754).

To the same effect are several very recent decisions of this court. (*Knoxville v. Water Co.*, 212 U. S., 1; *Prentis v. Atlantic Coast Line Co.*, 211 U. S., 210; *Willcox v. Consolidated Gas Co.*, 212 U. S., 19.)

- (b) The Commission had a right, in determining the reasonableness of rates involved, to consider the effect of the advance by the railroads from \$3.10 to \$5 per ton upon the transportation of lumber.

The record in this case shows conclusively that the advance in rates made by the railroads in 1907 from \$3.10 to \$5 per ton for the transportation of the class of lumber here involved, would, if permitted to stand, simply stop such transportation altogether. This advance of \$1.90 per ton would be equivalent to \$3.13½ per thousand feet, whereas the total profit in the manufacture of this lumber in the Willamette Valley during the last seven years has ranged from \$1.50 to \$2.50 per thousand feet. In other words, the increase in the cost of transportation completely destroys the mills. (Report of the Commission, Rec., 15 to 28.)

It follows that the \$5 rate, being absolutely prohibitive of any traffic, *amounts to a withdrawal of transportation facilities.*

Can it be said that the Interstate Commerce Commission erred in taking these facts into consideration in determining what, under all the circumstances, would be a reasonable rate? The railroads induced the manufacturers and shippers of lumber to locate along their lines. They assumed the duty of affording transportation. Could they thereafter cease to furnish such transportation by putting a price upon it which amounted to a refusal to haul the lumber to market at any price? It may be admitted that even though a railroad company has assumed the duty of furnishing transportation to a community

by the construction of its line and the offer of its facilities, it may nevertheless refuse to continue such facilities at a loss. But where it does not appear that a continuance of the facilities would compel a service below cost, and where the only question is a difference in the amount of profit, it would seem appropriate that the public authority fixing the rate should take into consideration the duty of the railroad to continue the facilities in determining what would be a reasonable rate.

This court in *Atlantic Coast Line R. R. v. North Carolina Corp. Com.* (206 U. S., 1) refused to set aside an order of a state commission which required the railroad to put on an additional passenger train at a daily cost of operation of \$40, with probable daily receipts of \$25. The position taken by the court was that where the duty rests upon a carrier to furnish facilities to the public—

that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness. * * * As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance.

There is no difference in principle between requiring a railroad company to operate a particular passenger train, even at a loss, where the circumstances have imposed the duty upon the company, and requiring a railroad to transport a particular class of freight at some rate which will make possible the furnishing of the facility, even though a loss should result, if circumstances have imposed upon the company the duty of supplying the transportation. And the case is a much stronger one where it does not appear that the rate required will result in a loss to the company; and where it does appear, as in the case at bar, that the Commission, authorized to examine the question, has found that the particular rate prescribed will yield a full and fair return for the service performed.

- (c) **In determining what was a reasonable rate, the Commission was right in considering, as an item of evidence, the fact that the railroads had voluntarily established and long maintained a rate of \$3.10 for the service.**

The objection of the railroads to the consideration, by the Commission, of any circumstances connected with the original establishment of the \$3.10 rate and the subsequent withdrawal, restoration, and final substitution of a \$5 rate comes at last to this: That the Commission had no power, in determining what was a reasonable rate, to admit any evidence of the rates the railroads themselves had fixed from time to time.

Yet the very best evidence of what is a reasonable rate is what the railroads have been in the habit of charging. It is never possible to ascertain with

mathematical exactness what rate on a particular commodity will pay the cost of transporting that commodity, together with a fair profit to the carrier.

As pointed out by Commissioner Harlan in *Frye v. Northern Pacific Ry. Co.* (13 I. C. C. Rep., 501, 507, 508):

There is a wide difference in the character of testimony required to test the reasonableness of an entire schedule of rates covering the whole traffic of a particular carrier and that required to test the reasonableness of a rate on a particular commodity between two definite points. * * * Certainly the present state of the science of railway accounting does not enable us * * * to fix with certainty a reasonable rate upon a particular commodity between two points.

For these reasons the best evidence of the reasonableness of a particular rate between two points will often be either what the same or similar commodities are carried for on other roads, or what the railroad whose rate is attacked has voluntarily charged in the past. Of course the voluntary establishment of a rate is not conclusive as to reasonableness. But, as the Interstate Commerce Commission has said in another case (8 I. C. C. Rep., 561, 568),

When a railway company advances a rate which has been for some time in force, the fact of its continuance is in the nature of an admission against that company, which tends to show the unreasonableness of the advance.

Finally, as this court has several times declared, it ought not to be assumed that a carrier has for years voluntarily performed an unremunerative service, and therefore a rate established and maintained by the railroads affords at least some indication of reasonableness and may properly be considered in any investigation of rates. (*Covington Stockyards v. Keith*, 139 U. S. 128; *Interstate Commerce Commission v. Chicago, etc., R. R. Co.* 186 U. S. 320.)

(d) The record shows that the Commission heard voluminous testimony on the subject of the reasonableness of the rates with relation to the cost of the service, the revenues of the carriers, and the charges for the transportation of similar commodities.

The testimony and exhibits before the Commission cover nearly three hundred pages of the record. They show that the Commission examined the whole question thoroughly and considered every fact and circumstance adduced by either side, which tended to show what rate would be just and reasonable in relation to the service performed, the cost of operation, and the revenues of the carriers. The physical condition of the road was examined (Rec., 180); the rates on lumber from other Southern Pacific points (Rec., 198); the class rates and local tariffs (Rec., 199 to 208); the prevailing market price for a number of years for the lumber shipped (Rec., 209); the history of the rates on lumber from various points on the Southern Pacific lines in Oregon to various points in California (Rec., 210, 212); the schedules of

various freight trains and the loads carried (Rec., 214, 222); the record of lumber shipments between various points (Rec., 223, 224); the freight tariffs of the Southern Pacific lines in Oregon (Rec., 229, 256, 283); the tariffs on lumber and lumber products of the Southern Pacific Company (Rec., 285, 329); and the rates on various other commodities moving between the same points, and requiring substantially the same service as that involved in the transportation of green fir lumber (Rec., 230-283, 384).

The reasonableness of the \$3.10 rate in and of itself was considered (Rec., 22, 24, 123), Commissioner Prouty saying, at page 123 of the record, that the question was whether or not that rate could be maintained "with a reasonable profit," or whether a higher rate would be necessary in order to yield a reasonable profit. "In other words," says the Commissioner, "it would make a difference, in my opinion, as to whether this was a fairly good business on the \$3.10 or the \$4 or \$5 rate, or whether there was no money in it at all."

The reasonableness of the \$5 rate in and of itself was considered. (Rec., 63, 65, 101, 122, 124, 189.) At pages 63 and 65 of the Record it was sought to make counsel for the shippers admit that the \$5 rate was reasonable and the statement is made that without regard to the promise of the railroads to maintain a \$3.10 rate the new rate of \$5 is unjust and unreasonable.

The earnings, cost of operation, and other items directly bearing upon the service were fully inves-

tigated. At page 179 of the record it appears that the earnings of the railroad in the State of Oregon during the period when the \$3.10 rate was in effect had largely increased, notwithstanding the fact that its roadbed had been improved, new rails had been laid, and larger locomotives put in operation. At pages 22 and 23 of the record it appears that the Southern Pacific Company, which owns the stock of the Oregon and California, in 1897, before the \$3.10 rate was put into effect, realized gross earnings in the amount of \$1,436,037 and net earnings of \$323,000, while in 1907, after the operation of the \$3.10 rate, its gross earnings were \$6,417,000 and its net earnings were \$1,650,000. In other words, during these ten years there had been an enormous increase in net earnings and such net earnings were, at the time the complaint was heard by the Commission, \$2,500 per mile.

A comprehensive statement of the earnings and expenses, traffic, operating, and financial statistics of the two companies appears in the record at pages 376 to 385.

(e) The record shows that the Commission did not limit the basis of its order to the past conduct of the railroads, but, independently of any so-called estoppel, expressly found the \$5 rate to be unreasonable and the rates prescribed to be reasonable.

Upon the testimony above referred to the Commission made its findings and order, and while it is true that it considered the circumstances under which the railroads had originally established the

\$3.10 rate and subsequently supplanted it with the \$5 rate, it is perfectly clear from an examination of all the proceedings that the Commission did not regard these circumstances alone as the basis for its order, but proceeded independently of them to find the \$5 rate unreasonable and the rates prescribed reasonable.

This was the view taken by the court below and is fully justified by a consideration of all the proceedings.

In the first place, it appears at the hearing (Rec., 141, 142) that the Commission desired, preliminary to any consideration of the reasonableness of rates, to ascertain what the earnings of the roads were for the transportation of the very lumber involved and what was the cost of operation.

The following abstracts from the record (pp. 141, 142) show this conclusively:

Commissioner PROUTY. We ought to have, if it can be furnished, a statement showing the earnings from the movement of lumber on this railroad in question, from Portland to San Francisco. [Thus embracing all movements in the Willamette Valley.]

It then appearing that counsel for the shippers had asked for a statement covering the entire Southern Pacific system, the following colloquy occurred (Rec., 142):

Commissioner PROUTY. We do not want that; but it seems to me that this Commission ought to know, *before it passes on this question,*

substantially what your earnings are on this railroad.

Mr. COTTON. There is no objection to that at all.

Commissioner PROUTY. What your train mileage cost is, for example, on this railroad and what your earnings for a specified period under the \$3.10 rate were from lumber on this railroad, *and other general facts of that sort*, so as to give us some general idea as to what it costs to operate trains on this line between Portland and San Francisco.

Then follow various requests on the part of counsel for the shippers for information from the railroads, such as, the number of cars used for the shipment of lumber; a tabulated statement showing the car movement of lumber and lumber products over the road in the Willamette Valley and over the various branch lines; the division of revenues and operating expenses between the Southern Pacific and the Oregon and California roads and other like matters. With respect to some of these items it was claimed that the records had been destroyed and all the information could not be furnished.

At pages 146 to 161 of the record there appear various requests by the Commission for specific information to be furnished by the railroads bearing upon the amount of lumber shipped; the total number of cars in operation during certain periods; the average carload of lumber; the size of the trains; the entire lumber earnings as compared with entire freight earnings for specific periods; the total earn-

ings of the road including passenger and freight earnings; the percentage of operating expenses; the earnings per train mile from freight alone; the operating cost per train mile; the annual reports to stockholders; class rates and commodity rates on standard articles, and various other facts necessary to an approximate ascertainment of the exact cost of the service here involved, the earnings upon it, and the effect of particular rates.

The statements furnished in answer to this request of the Commission appear in the record, 194 to 330.

Certainly the call for such information and the consideration of it by the Commission do not support the view that the Commission intended to base its order entirely upon some promise of the railroads to maintain a particular rate, but intended to consider the reasonableness of rates independent of any such promise.

In the opinion of the Commission, which appellants claim evidences an intention to base the order entirely upon the moral obligation of the railroads to maintain a lower rate, the very contrary appears. At page 23 of the record this abstract is taken from the Commission's opinion:

The complainants earnestly insist that we may and should look into the past history of this rate in disposing of this question.

It is not claimed that the defendants were under contract with any one shipper, nor with the general body of shippers in that region, to maintain the \$3.10 rate. *It is doubtful if such a contract would be valid.* At any

rate no such contract was ever made. While the defendants announced that they would establish a rate of \$3.10, they never stated that they would maintain this rate in effect for any given length of time.

And further, at page 24, it is apparent from the opinion of the Commission that no order would have been made reducing the rate if the complainants had relied solely upon supposed equities between them and the railroads and if the facts in evidence before the Commission had not shown that a lower rate could be prescribed without seriously impairing the revenues of the roads or requiring them to perform the service without a fair profit. The Commission says:

The expense of handling traffic under this rate (\$3.10) is not greater than the revenue, thereby occasioning a loss which must be made up upon other business. *Such a rate would present an entirely different question from that before us.* Here the business is remunerative directly, beside being highly beneficial to the defendants indirectly.

Again, at page 22, in referring to the former \$3.10 rate established by the railroad, the Commission says:

The \$3.10 rate was certainly a low one, but we are satisfied that it did yield when established, has ever since yielded, and would for the future yield a substantial return over and above the cost of operation and that its maintenance in the past has contributed much to the prosperity of the defendant.

Finally, the Commission makes this finding with respect to the reasonableness of the \$5 rate complained of by the shippers (Rec., 26):

We are of the opinion, then, that the present rate of \$5 from all mills in the Willamette Valley, not including Portland, is unjust and unreasonable; that for the future from mills upon the east bank, and upon the west bank south of Corvallis that rate should not exceed 17 cents per hundred pounds, or \$3.40 per ton, upon rough, green fir lumber and lath, and that from points upon the west bank north of Corvallis it should not exceed \$3.65 per ton.

Even the dissenting opinion of two members of the Commission (Rec., 27) does not justify the claim of the railroads in this case that the Commission based its order solely upon matters of estoppel. In this dissent the statement is made that the opinion of the Commission "seems largely to rest" on such matters of estoppel. But that the reasonableness of the rates, independently of all other matters, was directly in issue is shown by the statement in the dissenting opinion, in which it is said:

For these reasons *and also because I consider the present rate not to be an unreasonable rate* I am constrained to withhold my assent to the disposition made of the complaint.

If there had been no evidence before the Commission touching the reasonableness of the rate, independently of all other considerations, the commissioner dissenting could not have reached the

conclusion that he considered the rate of the railroads to be reasonable.

It is suggested finally on this question as to the basis of the Commission's order that some consideration may very properly be given to the answer of the Commission in this case. (Rec., 338, 346.) In this answer the following allegations are made:

This defendant denies that it did not find the rate of \$5 per ton to be unreasonable, and avers that it did find such rate to be unreasonable and unjust. This defendant admits that it did find the rate of \$3.10 to be a low rate, but it denies that it found such rate to be unreasonably low. Defendant denies that the rate of \$3.40 and the rate of \$3.65 are substantially the same as the rate of \$3.10. Defendant avers that green fir lumber and lath is and can be carried by complainants without appreciable risk of damage in transit. It moves in volumes regularly throughout the year, is hauled on the least expensive cars, and is loaded and unloaded by the shipper or consignee. It is an article of wide consumption, and is entitled relatively to as low a rate as is provided for any other commodity.

Defendant denies that the rates of \$3.40 and \$3.65 per ton, as ordered and prescribed by it, were or are unreasonably low rates; * * * denies that said rates are * * * less than what is just and reasonable for the service rendered; and denies that said rates do not * * * pay the cost of the service rendered. Avers that the rates prescribed in

this order and made the basis of this suit are just and reasonable and in every sense remunerative to the carrier and are just to the shippers and to the public.

THIRD.

As to the assertion of the railroads that the rates established by the Commission are unreasonable or below the cost of service.

Upon the issue whether the rates prescribed by the Commission are unreasonably low, or below the cost of service within the constitutional inhibition, the case comes here upon this state of the pleadings:

The railroads in their bill of complaint (Rec., 45) allege that the rates prescribed by the Commission are unreasonable and below the cost of service. The Commission in its answer denies this allegation, and avers that such rates are just and reasonable and "in every sense remunerative to the carriers." (Rec., 346.) The replication of the railroads is of no importance, since it is merely the formal assertion that they will prove their bill. (Rec., 361.)

Upon this state of the pleadings the Circuit Court said:

The pleadings, as changed since the case was last presented to the court, no longer raise the point, then made, that the rates so fixed were below the cost of transporting the lumber. (Rec., 365.)

We submit that this is correct. But in any event, since the railroads have attacked the lawfulness of the rates prescribed by the Commission the burden was

upon them to show that the rates so fixed were below the cost of service or so unreasonably low as to amount to a confiscation of property. *They introduced no testimony whatever, either before the Commission or the court below, which proves or tends to prove this allegation in their bill of complaint.*

In the final analysis the issue in this case is whether or not the rates fixed by the Commission are so low as to constitute a deprivation of property. Upon that issue we have, on the one hand, the express finding of the Commission in its report and order that the rates prescribed are reasonable and remunerative, together with a volume of testimony as to the character of the service, the cost of operation, the lumber rates elsewhere in the same vicinity, the rates on other like commodities, and the gross and net earnings of the roads during the period covered by the controversy. On the other hand, we have merely the assertion of the railroads that, in their opinion, the rates fixed by the Commission are too low.

Certainly under these circumstances the case does not present "clearly and beyond all doubt," as this court said in *Land Co. v. National City* (174 U. S., 739)—

Such a flagrant attack upon the rights of property * * * as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation (p. 754).

Certainly the rates thus fixed do not come within the rule stated by this court in *Willcox v. Gas Co.*

(212 U. S., 19) that in order to justify judicial interference—

The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and the public.

That the burden is upon the railroads complaining of the order to show that the rates prescribed by the Commission constitute a deprivation of property is decided by this court in *Minneapolis and St. Louis Ry. Co. v. Minnesota* (186 U. S., 257), where Mr. Justice Brown says, at page 267:

We don't think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that *the burden is upon them to impeach the action of the commission in this particular.*

An important consideration in this case is the amount of traffic involved. The record shows (p. 20, 21) that the total shipment of lumber from the Willamette Valley to all points in 1907 (when the new rate complained of was put into effect by the railroads) was about 12,500 cars, and of these only about 1,000 cars were affected by the order of the Commission. In other words, *only 8 per cent of one commodity, out of all the business transacted by the companies, is affected by this order.* How can it be said that such an infinitesimal portion of the

total business of the railroad, inseparable from such total business, and incapable of exact mathematical calculation as to cost and profit, can be so affected by a rate as to constitute a confiscation of property, where the total business of the road shows a large increase in annual net earnings, under a rate even lower with respect to the particular commodity?

The authorities are uniform upon the point that even though the rate prescribed by a Commission for the transportation of a particular commodity would, if made the basis of all rates on all business done by the road, result in requiring the operation of the road below the cost thereof, still if the rate prescribed is not for a distinct and separable service and if it appears that notwithstanding such a rate the road is enabled to earn a fair return upon all its business, the rate so prescribed will not be condemned as a deprivation of property. (*Minn. and St. Louis R. R. v. Minnesota*, 186 U. S., 257; *Atlantic Coast Line R. R. v. N. C. Cor. Com.*, 206 U. S., 1; *St. Louis and San Francisco R. R. Co. v. Gill*, 156 U. S., 649.)

In the case at bar the rate of \$3.40 for the transportation of green fir lumber from certain points on the Willamette River to San Francisco, and the rate of \$3.65 for such transportation from certain other points on the Willamette River to San Francisco are 30 cents per ton higher than the rates which the railroads established and long maintained for the same service; and it appears that while the \$3.10 rate was in effect the general earnings of the roads increased, notwithstanding extensive improvements

and betterments, until they reached more than \$2,500 annually per mile. Cases such as the *Southern Ry. Co. v. St. Louis Hay and Grain Co.* (214 U. S., 297) and others of similar import, do not apply here for the reason that they show instances of a distinct service entirely separable from the general business of the roads, the exact cost of which was easily ascertainable, and where it was admitted that the Commission had fixed a rate below such cost. But where, as in the case at bar, no attempt is made by the railroads to show the exact cost of the transportation of a ton of lumber from the Willamette Valley to San Francisco, no testimony is introduced by the roads tending to prove that the rates for this particular service prescribed by the Commission are below the cost of such service, and where the particular service constitutes an inappreciable portion of the total business of the roads and the total business is admitted to be profitable, there is no authority to justify an annulment of the Commission's order.

Counsel for the appellants rely chiefly upon the case of *Cotting v. Kansas City Stock Yards* (183 U. S., 79) in support of their claim that in reducing a rate the Interstate Commerce Commission must always be able to demonstrate mathematically that the rate prescribed will afford a fair and full return upon the transportation of the particular commodity, and that even though the great bulk of business of the railroad is not affected by the order and is admitted to be profitable as a whole, notwithstanding such

order, still this mathematical demonstration of cost and profit must be made with respect to the particular commodity carried. There is no such principle announced in the *Cotting* case. Indeed, the opinion in that case expressly points out the difference between a purely public service, such as railroads are engaged in, and a private business, such as stock yards conduct; and further, it appears that a majority of the court based their conclusion wholly upon the ground that the statute involved was a violation of the Fourteenth Amendment to the Constitution in that it applied only to the Kansas City Stock Yards Company and not to other companies or corporations engaged in like business in that State. No case is or can be cited which qualifies the decisions in the *Minnesota* case (186 U. S., 257), the *Atlantic Coast Line* case (206 U. S., 1) and the *Gill* case (156 U. S., 649), which clearly uphold the view that an order of a commission fixing a rate will not be set aside as a confiscation of property, even though the rate prescribed is less than the cost of the service, if it appears that the total business of the company is not injuriously affected or rendered unprofitable. And in the *Minnesota* case, *supra*, Mr. Justice Brown declares that the burden is upon the railroads to show that the order of the Commission has this effect.

In the case at bar there is not only no claim that the rate prescribed requires the operation of the roads at a loss, but it is admitted that the earnings and profits of the roads have greatly increased under a lower rate for the transportation of green fir lumber

in the Willamette Valley. And further, in the case at bar, it does not appear from any testimony that the particular service to be performed for the rate fixed by the Commission will not yield a fair and full return upon the cost of performing such particular service, and the express finding of the Commission, from the evidence adduced, is that the rates fixed will in fact pay such fair and full return.

In one of the assignments of error appellants complain that the court below erred in dismissing the plaintiff's bill because it appeared that the Commission in fixing the rate took into consideration matters in their official cognizance.

There is no error in this and certainly no prejudice. It appears from the context of the stipulation (Rec.; 374, 375) that counsel on both sides had in mind such matters as the reports and tariffs required by law to be filed with the Commission, made public records by the interstate commerce act, and "received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings." (Section 16, interstate-commerce act as amended June 29, 1906.) There are no other matters conceivable which may be said to be within the "official cognizance" of the Commission, unless they be facts such as the general topography of the country, the distance between certain points, the capacity of cars, the bulk and convenience of handling certain commodities and other like things of which the Commission may, without testimony, take official notice.

Doubtless this is what this court had in mind in a recent case where the fact is recognized that the Commission may reach its conclusion, not only from the testimony of witnesses but from its own knowledge of conditions. Speaking of the weight to be given, a finding of the Commission, it is said in *Ill. Cent. R. R. Co. v. Interstate Commerce Com.*, 206 U. S., at page 454, that the Commission—

in addition to “knowledge of conditions, of environment, and of transportation relations,” has had the witnesses before it.

CONCLUSION.

In submitting this case it is respectfully suggested that every intendment of law and fact should avail to support the order of the Commission and the decree of the court below. The matter of these lumber rates has been thoroughly examined. There has been a full hearing. The order was made “*after both parties had announced that they had no further evidence to present.*” (Rec., 342.) The Commission expressly found that the \$5 rate fixed by the railroads was unjust and unreasonable. It prescribed a rate 10 per cent higher than that which the railroads had themselves long maintained; it found that the rate so prescribed was just, reasonable, and fairly remunerative and the railroads offered no evidence whatever to the contrary.

Counsel for the appellants confuse the issue in this court as they did at both hearings in the court below, by assuming that the courts are concerned with

the reasonableness or unreasonableness of the old \$3.10 rate, or with the reasonableness or unreasonableness of the \$5 rate, whereas the only question with which the court is concerned is whether or not it clearly appears that the rates of \$3.40 and \$3.65 respectively prescribed by the Commission are so low as to amount to the taking of property without due process of law.

A rate of \$3.10 might be unreasonably low, but it does not follow that a rate of \$3.40 or \$3.65 would be unreasonably low. A rate of \$5 might not be so high as to be beyond any justification but it does not follow that a rate of \$3.40 or \$3.65 would be too low.

The Commission was concerned with the \$5 rate only for the purpose of ascertaining whether or not it was unreasonable, and it was concerned with the \$3.10 rate only as an item of evidence to assist in determining what would or would not be reasonable. But the court is concerned only with the rates of \$3.40 and \$3.65, which were prescribed by the Commission. And as to them there is no testimony to contradict the conclusion of the Commission.

The first duty of the Commission, on complaint of the shippers, was to inquire into the reasonableness of the \$5 rate complained of, to grant a hearing, and to take testimony. When that was done, the next duty of the Commission, if it found the existing rate to be unreasonable, was to prescribe a rate which in its judgment would be just and reasonable. When that was done, and the railroads challenged the va-

lidity of the Commission's order in the courts, the burden was upon the railroads to show that the rate prescribed by the Commission was so low as clearly to confiscate their property. Having failed to do so, the order of the Commission must stand. This was the view taken by the Circuit Court, and the decree below should be affirmed.

Respectfully submitted.

WADE H. ELLIS,

Special Assistant to the Attorney-General.

LUTHER M. WALTER,

Counsel for the Interstate Commerce Commission.

DECEMBER, 1910. ◊

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SOUTHERN PACIFIC COMPANY *v.* INTERSTATE
COMMERCE COMMISSION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 527. Argued December 13, 1910.—Decided February 20, 1911.

An order of the Interstate Commerce Commission, made in consequence of assumption of powers not possessed by it, is void, and its enforcement should be restrained by the courts.

The powers of the Interstate Commerce Commission do not extend to regulating and controlling the policy of the owners of railroads in fixing rates, and it cannot substitute for a just and reasonable rate, a lower rate, either on the ground of policy or on the ground that the railroad was by its former conduct estopped from charging a reasonable rate.

Where the shippers do not complain of a new and higher rate because it is intrinsically an unreasonable one, but because, although reasonable, the railroads are estopped to advance it on account of having maintained the lower rate for a considerable period, it is beyond the power of the Commission to direct a restoration of the old rate; and so held in regard to the Willamette Valley lumber rates.

Where the Commission makes an order restoring a rate that shows on its face it was made on the ground that the railroad was estopped to increase it, the order will not be presumed to have been made for the purpose of establishing a reasonable rate, if it excludes a section from the benefit of the restored rate which amounts to a discrimination against that section.

Questions arising on the validity of an order of the Interstate Commerce Commission fixing a rate do not become moot merely because the period for which the rate is prescribed has expired, where an element of liability for reparation remains. See *Southern Pacific Terminal Company v. Interstate Commerce Commission*, post, p. 498.

THE facts, which involve the validity of an order of the Interstate Commerce Commission in regard to appellants' rates on lumber, are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. F. C. Dillard* was on the brief, for appellants.

Mr. Wade H. Ellis and *Mr. Luther M. Walter* for the Interstate Commerce Commission, appellee:

The railroads complain of the order first because the Commission was without authority to fix any rates whatever; second, because the Commission did not establish the new rates because the low rate was unreasonable or because the new rates were reasonable, but simply because the railroads had promised and long maintained a lower rate; and because the rates established by the Commission are asserted by the railroads to be unreasonably low, unremunerative, and even below the cost of service.

Congress itself may fix interstate railroad rates. *Gibbons v. Ogden*, 9 Wheat. 1. It is expressly asserted in many cases. *Wabash &c. R. R. Co. v. Illinois*, 118 U. S. 557; *Phila. S. S. Co. v. Pennsylvania*, 122 U. S. 326; *Northern Securities Case*, 193 U. S. 197, 368.

Fixing of rates is a regulation of interstate commerce. *Maximum Rate Cases*, 167 U. S. 479; *C., N. O. & T. P. v. Int. Comm. Comm.*, 162 U. S. 184, 197; *Smyth v. Ames*, 169 U. S. 466; *Wabash R. R. Co. v. Illinois*, 118 U. S. 557.

Congress may confer upon a commission power to ascertain what rate as a maximum will be just and reasonable and prescribe and enforce that rate. *Missouri River Rate Cases*, 218 U. S. 88; *Int. Comm. Comm. v. C., R. I. & P. Ry. Co.*, 218 U. S. 88; *Int. Comm. Comm. v. C., B. & Q. Ry. Co.*, 218 U. S. 113; *Int. Comm. Comm. v. Stickney*, 215 U. S. 98; *Int. Comm. Comm. v. C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, 494.

The power thus exercised by the Commission does not constitute the usurpation of legislative or judicial functions, or unite in one body conflicting governmental authority, but consists merely in the ascertainment of facts upon which operates the general rule of Congress prescribing just and reasonable rates. *St. L. & C. Ry. Co. v. Taylor*, 210 U. S. 281; *Railroad Commission Cases*, 116 U. S. 307; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *Field v. Clark*, 143 U. S. 693; *Buttfield v. Stranahan*, 192 U. S. 470; *Union Bridge Co. v. United States*, 204 U. S. 364.

Penalties imposed by the Interstate Commerce Act do not amount to a deprivation of property because, first, no penalties are sought to be recovered in this case, and, second, the penalty provision is separable from the remainder of the statute. *Commodities Clause Cases*, 213 U. S. 366, 417.

The real gist of the railroads' complaint is that the Commission heard testimony as to the circumstances under which the old rate of \$3.10 had been established and maintained and, after being once increased and again restored, was finally supplanted by the new \$5 rate which the shippers made the subject of their appeal for relief.

The only point pressed by appellants is that the Commission gave a wrong reason for its action, but no expressions in the opinion of the Commission can be used to defeat its order if the order is otherwise lawful. *So. Pac. Co. v. Int. Comm. Comm.*, 200 U. S. 536, 556, 557.

The Interstate Commerce Commission is not a court. It is not governed by technical rules of law with respect to the admission of evidence. *Int. Comm. Comm. v. Baird*, 194 U. S. 25, 44; § 13 of the Interstate Commerce Act as amended.

The chief function of the court, is to consider not the method by which the result was reached, but whether or not the rate prescribed is so low as to contravene the con-

stitutional provisions for the protection of property. *San Diego Land Co. v. National City*, 174 U. S. 739; *Knoxville v. Water Co.*, 212 U. S. 1; *Prentis v. Atl. Coast Line Co.*, 211 U. S. 210; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19.

The Commission had a right, in determining the reasonableness of rates involved, to consider the effect of the advance by the railroads from \$3.10 to \$5 per ton upon the transportation of lumber.

The record in this case shows conclusively that the advance in rates made by the railroads in 1907 from \$3.10 to \$5 per ton for the transportation of the class of lumber involved, would, if permitted to stand, simply stop such transportation altogether.

It follows that the \$5 rate, being absolutely prohibitive of any traffic, amounts to a withdrawal of transportation facilities. *Atl. Coast Line R. R. Co. v. No. Car. Corp. Comm.*, 206 U. S. 1.

In determining what was a reasonable rate, the Commission was right in considering, as an item of evidence, the fact that the railroads had voluntarily established and long maintained a rate of \$3.10 for the service. *Frye v. Nor. Pac. Ry. Co.*, 13 I. C. C. Rep. 501, 507, 508; *Holmes v. So. Ry. Co.*, 8 I. C. C. Rep. 561, 568; *Stockyards v. Keith*, 139 U. S. 128; *Int. Comm. Comm. v. Chicago & C. R. Co.*, 186 U. S. 320.

The Commission heard testimony on the reasonableness of the rates and did not limit the basis of its order to the past conduct of the railroads, but, independently of any so-called estoppel, expressly found the \$5 rate to be unreasonable and the rates prescribed to be reasonable.

The railroads having attacked the lawfulness of the rates prescribed by the Commission, the burden was upon them to show that the rates so fixed were below the cost of service or so unreasonably low as to amount to a confiscation of property. They introduced no testimony whatever, either before the Commission or the court be-

low, which proves or tends to prove the allegation in their bill of complaint.

The real issue in this case is whether or not the rates fixed by the Commission are so low as to constitute a deprivation of property. *Land Co. v. National City*, 174 U. S. 739; *Willcox v. Gas Co.*, 212 U. S. 19.

If the rate prescribed is not for a distinct and separable service and if it appears that notwithstanding such a rate the road is enabled to earn a fair return upon all its business, the rate so prescribed will not be condemned as a deprivation of property. *Minn. & St. L. R. R. Co. v. Minnesota*, 186 U. S. 257; *Atl. Coast Line R. R. Co. v. No. Car. Corp. Comm.*, 206 U. S. 1; *St. L. & S. F. R. R. Co. v. Gill*, 156 U. S. 649.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Whether the court below was right in refusing to enjoin at the suit of the railway companies who are appellants the enforcement of an order of the Interstate Commerce Commission is the general subject for consideration on this record.

When that which is superfluous is put out of view, it will come to pass that every substantial controversy which the case presents will be disposed of by determining what was the character of the order made by the Commission; that is to say, what was the power which that body exerted in making the order in question. We state at once the pertinent facts.

The Willamette Valley, about 150 miles long, lies in the western part of the State of Oregon, south of the Columbia River, and through it there flows in a northerly direction the Willamette River, which empties into the Columbia River. Portland is on the Willamette River at or near where that river empties into the Columbia River. From

Cornwallis, on the Willamette River, a point about 97 miles south of Portland, that is, about that distance from where the Willamette empties into the Columbia, the Willamette is navigable, and there is navigation from Portland to the sea by means of the Willamette and the Columbia Rivers. The rails of the Oregon and California Railroad from Portland pass through the Willamette Valley, paralleling the Willamette River at various distances, and extend to the Oregon and California state line, where that road connects with the Southern Pacific Company. The latter has for a number of years operated the Oregon and California as part of its system.

In November, 1907, a complaint was filed with the Interstate Commerce Commission on behalf of the Western Oregon Lumber Manufacturers' Association and others, concerning a rate of \$5 per ton, in carload lots, on "green common rough fir lath and lumber and forest products" from Willamette Valley points to San Francisco and bay points, fixed in a tariff filed by the Southern Pacific Company with the Commission and which became operative in April, 1907. It was charged that the rate complained of was unreasonable in and of itself and discriminatory. It was averred that from about 1898 there had existed a rate of \$3.10 for carrying the same character of lumber between the points named; that upon the faith of this rate and the belief that it would not be changed large amounts of capital had been invested in lumber mills in the Willamette Valley; that the people in that valley were dependent upon the lumber industry, and that such industry would be destroyed and the population be detrimentally affected if the new rate of \$5 per ton was continued to be charged. It was alleged that the \$3.10 rate was reasonable in and of itself, and that the rate had been increased without just cause upon the theory that the lumber interest in the Willamette Valley was prosperous, and that hence the traffic could stand the increase. The

railroad companies answered, setting up the reasonableness of the \$5 rate. They in effect averred that the \$3.10 rate, which had previously prevailed, was unreasonably low and that it had been fixed solely for the purpose of enabling lumber from the Willamette Valley to reach a market in San Francisco and bay points, which it could not have done if a just and reasonable rate had been exacted. This condition, it was alleged, had arisen from the fact that from Portland and other points on the Columbia River and Puget Sound there was a highly developed lumber industry accessible to San Francisco and bay points by water at rates so low as to have absolutely excluded the shipping of any lumber from the Willamette Valley by rail to such points, unless a very low rate had been fixed by the railroad companies to meet the water-borne lumber traffic, and that there was no market which was commercially available for the Willamette Valley lumber other than that of San Francisco and bay points when the \$3.10 rate was fixed. The complaint and the answer which we thus state are not in the record, but we have summarized their contents from a statement made concerning the same by the Interstate Commerce Commission in its answer in this suit filed in the Circuit Court.

It is certain that for a number of years the \$3.10 rate was applied both to shipments of lumber not only from the Willamette Valley, but also from Portland. Several years, however, before the going into effect of the \$5 rate fixed in the tariff of April, 1907, a tariff fixing that rate had been made applicable to Portland. During the hearing before the Commission the Portland lumber interests intervened and asked that if the \$3.10 rate was restored to Willamette Valley it should also be restored to Portland, so as to prevent discrimination against Portland.

After a hearing the Commission in June, 1908, filed its report and made an order adverse to the railway companies, Commissioners Knapp and Harlan dissenting. 14

I. C. C. Rep. 61. It suffices to say that the order entered directed the railroad to cease from charging the \$5 rate complained of from Willamette Valley points and fixed as a proper rate from certain points in the valley the sum of \$3.40 a ton, and from the remaining points in the valley the sum of \$3.65. Although some of the points embraced by the order were within a few miles of Portland that city was not given the benefit of the reduction, and therefore remained subject to the \$5 rate.

The railroad companies, refusing to yield obedience to the order, commenced this suit in equity in the Circuit Court of the United States for the Northern District of California to have the order set aside and to enjoin its enforcement. After a demurrer was sustained, an amended bill was filed. By this bill it was averred that the rate of \$5 fixed by the tariff which the Commission had set aside was a just and reasonable rate *per se*, and that the rate fixed by the Commission was so unreasonably low as to be unjust and unreasonable. This was alleged to be the case not only in view of the great increase in the cost of the operation of the road since the time when the \$3.10 rate was put in force, but also because of the normally excessive cost of maintenance and operation resulting from the mountainous country which the road traversed, subjecting to an unusual expense for repairing damage done by floods and freshets, the high grades requiring the application of increased motive power, and permitting even with such power the movement of only unusually short trains, thereby causing a much greater average expense. Referring to the rate of \$3.10 which had previously prevailed, the circumstances connected with its establishment were detailed. It was alleged that the rate was unreasonably low when fixed and was so fixed by the railroad solely with the object of encouraging the lumber industry in the Willamette Valley and to enable it to reach a market, a result which otherwise could not have been attained.

The averments on this subject reiterated the statements made in the answer before the Commission. It was alleged that having maintained the unreasonably low rate for the reasons stated the railroad companies had finally changed the same and fixed a just and reasonable rate for the services rendered, because of changes in the situation of the lumber interest in the Willamette Valley. Those changes it was said arose from the opening of markets for lumber from the Willamette Valley by means of new railroad routes via Portland as a gateway to the East, by means of which a large percentage of lumber produced in the Willamette Valley was moved to other markets. It was alleged that the Commission, in setting aside the increased tariff rate of \$5 and fixing substantially the old rate, had exceeded the powers conferred upon it by law, because it did not act in the exercise of the authority conferred upon it to determine whether a rate was just and reasonable in and of itself with regard to the service rendered, but had proceeded upon the assumption that power was conferred upon it to fix an unreasonable rate because of its belief as to the equities of the situation or upon the basis of principles of estoppel or upon its conception of public policy and its right to enforce what was deemed best, under the circumstances, for the interest of shippers.

There was a demurrer to the amended bill, and the court certified the case to this court. The certificate was dismissed. 215 U. S. 226. On the receipt of the mandate the demurrer was withdrawn and a new demurrer, as also an answer to the bill, were filed. In the answer the lumber conditions in the Willamette Valley were recited, as also what were alleged to be the circumstances connected with the establishment of the \$3.10 rate and the proceedings had before the Commission in the controversy referred to, were detailed. The regularity of the proceedings before the Commission was averred, and the legality and finality of the findings and conclusions of that body were asserted.

It was declared that the rates fixed from the points in the Willamette Valley, excluding Portland, were just and reasonable in and of themselves. Traversing the allegations of the complaint, it was averred that the Commission found the \$5 rate to be unreasonable and unjust, admitted that it found the \$3.10 rate to be a low rate, but denied that it found such rate to be unreasonably low, and denied that the \$3.40 and \$3.65 rates were substantially the same as the \$3.10 rate.

The cause was heard upon the amended bill, the answer, the replication of the plaintiff and the evidence introduced before the Commission. The Circuit Court, as we have said, entered a decree dismissing the bill. This was done upon the theory that, as the Commission found that the rate fixed by it gave some remuneration above the cost of operation, and was not therefore confiscatory, there was no power to interfere. This appeal was then taken.

In the argument at bar the railroad companies do not question that if a complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate that body has the authority to examine the subject, and if it finds the rate complained of is in and of itself unreasonable, having regard to the service rendered, to order the desisting from charging such rate, and to fix a new and reasonable rate, to be operative for a period of two years. The companies further do not deny that where the Commission exercises such authority, its finding is not subject to be reviewed by the courts. *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452. In other words, the argument on behalf of the railroads fully concedes that an order of the Commission is not open to attack in the courts so long as that body has kept within the powers conferred by the statute. Making these concessions, the proposition relied upon to secure reversal is that the court below should have set aside the order of the Commission because that order was in excess of the

power conferred upon the Commission, and this, it is insisted, is to be determined by substance, and not mere form. In other words, the contention is, that although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power. Applying these propositions, the insistence is that both in form and in substance the order of the Commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which in and of itself in a legal sense might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered. On the other hand, the Commission in the argument at bar does not contend that it possessed the indeed

abnormal and extraordinary power which the railroads thus say was exerted in rendering the order complained of, a power which if it obtained would open a vast field for the exercise of discretion, to the destruction of rights of private property in railroads, and would in effect assert public ownership without any of the responsibilities which ownership would imply. While it is not denied on behalf of the Commission that that body may have considered the prior rate prevailing in the Willamette Valley, the period during which it had been in force, and the effect upon the business situation in the valley of a change to a higher charge, all these things it is insisted were not made the basis of the power exerted, but were simply taken into consideration as some of the elements proper to be considered in the ultimate exertion of the lawful power to forbid an unjust and unreasonable rate and fix a reasonable one.

It is clear, therefore, as we have said at the outset, that the result of the contentions and concessions of the respective parties is to reduce the controversy to a single issue, which is, What was the nature and character of the order made by the Commission? That is, What, in substance, was the power which the Commission exerted in making the order?

Coming to the consideration of that subject, we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests. We proceed very briefly to state the reasons which compel us to this conclusion. In the first place, when the complaint which was made to the Commission and the answer of the railroad companies to that complaint are considered they give rise to the inference that in substance

the subject complained of was not the intrinsic unreasonableness of the new rate which the railroad companies substituted for the former rate, but the injury it was thought would be suffered from not continuing the old rate in force, an injury arising from circumstances extrinsic to the new rate; that is, a loss which would be suffered by substituting the higher rate, even if that rate was in and of itself reasonable and just. That such was the view entertained by the complainants when the hearing began before the Commission is too clear to require anything but statement. Thus during the opening made on behalf of the complainants by their counsel, Mr. Teal, after he had made statements concerning the origin of the \$3.10 rate, the following took place:

"Commissioner COCKRELL: How much was that; \$3.10 a ton?"

"Mr. TEAL: \$3.10 a ton; yes, 15½ cents a hundred; and I will state that we do not claim that that is not a low rate. It is a low rate. In fact, I may say that it is one of the lowest rates on lumber in the United States, and it is a rate put in, as I state, maintained for the purposes I state, and the railroad company is entitled to full credit for having done it.

"Commissioner PROUTY: Let me ask you, Mr. Teal, this question. Suppose that rate had never been lower than 25 cents a hundred pounds, which is \$5 a ton, would you claim that this Commission today ought to reduce that rate?"

"Mr. TEAL: No; I don't think I would.

"Commissioner PROUTY: That is to say, you do not claim the rate is unreasonable in itself?"

"Mr. TEAL: No; I do not.

"Commissioner PROUTY: You put your case entirely on the ground that these people represented to your clients and to other mill men in the Willamette Valley that they would establish this lower rate for the purpose of building up the industry in that valley, and that the industry can-

not exist there in competition with other sections unless that rate is maintained in effect?

"Mr. TEAL: Yes, sir.

"Commissioner PROUTY: And therefore the railroad is obliged to maintain it in effect?

"Mr. TEAL: It has been maintained for eight or nine years. You have my position exactly, Mr. Commissioner.

"Commissioner PROUTY: That simply shows that it has been maintained and industries have grown up; that the railroad company has, during that period, elected to maintain it, and found it profitable, probably?

"Mr. TEAL: You have stated my position exactly. I am not here complaining about the rates being high or low, because it is a low rate."

Thereafter, as Mr. Teal concluded his opening statement, the following occurred:

"Commissioner PROUTY: That seems to be your case, Mr. Teal. If they can, there is no reason from your statement why the rates should be reduced, because you say the rate is low enough, unless those men have been induced to build their mills there, and ought to be protected.

"Mr. TEAL: That is correct. I want you to understand, Mr. Commissioner, that I do not claim the Commission has a right to compel the railroad, under ordinary circumstances, to meet water rates or any other competition."

It is true that subsequently, when counsel for the railroad companies was about to make his opening statement, Mr. Teal, after reiterating "that the \$3.10 rate is a low rate," observed: "I do not say it should necessarily pay a \$5 rate. That is, I do not want to be understood as saying that this rate of five dollars, in and of itself, would be reasonable." Answering the query of one of the commissioners as to whether, if the railroads had maintained in effect for the last ten years "this rate of 25 cents a hundred pounds," it would be claimed "that that was so unreasonable that the Commission ought to reduce it," Mr.

Teal answered: "Yes; I would claim that that would not be a reasonable rate to all these points." These remarks, however, can properly only be regarded as a declaration of an unwillingness to concede more than that the \$3.10 rate was a low rate, and the attempt to engraft a qualification or limitation upon the prior declarations of counsel cannot be treated as having any efficacy, since no proof whatever bearing upon an issue as to the reasonableness of the \$5 rate for the service to be rendered was introduced by the complainants. In fact, no attempt was even made to cross-examine Mr. Miller, the general traffic manager of the defendant, who testified on that subject. That the complainants intended to confine their evidence to the issue of whether the \$3.10 rate should be maintained in order to enable the lumber mills to continue to prosper is evidenced by the following:

"Commissioner PROUTY: . . . Mr. Teal, there does not seem to be much dispute about the questions in this case. The mills have a rate to the South, and one question is to what extent they are dependent upon that rate for their continued existence. They have a rate to the East. For what reason is not that rate as valuable to them as it is to Portland and other mills, and to what extent is it necessary that this rate should be maintained to San Francisco in order to fairly continue the prosperity of these establishments?

"Mr. TEAL: That is where I intend to confine my testimony."

The order of the Commission, as we have said, applied the rate which it fixed substantially to the very doors of Portland, but did not make the reduction applicable to that city. While we shall have occasion in a moment to refer to this aspect of the order as conclusively showing on its face that the power exerted in making it was not the power to condemn an unreasonable and fix a reasonable rate, an excerpt from the examination by Mr. Cotton for

the railroad companies and Mr. Abel for the intervenors, of two witnesses—J. Poulsen for the Portland interests and Dixon for the Willamette Valley interests—will make perfectly clear how really immaterial the question of the reasonableness of the \$5 rate was considered to be.

On cross-examination of Mr. Poulsen the following transpired:

“Mr. COTTON: In saying that you think Portland ought to have a lower rate, do you mean they should have a lower rate than a \$3.10 rate?”

“Mr. POULSEN: I mean they should have a lower rate than the inland people on account of having water competition.

“Mr. COTTON: But you do not express your opinion about the reasonableness of the rate?”

“Mr. POULSEN: No, sir.

“Mr. ABEL: He was not asked that.

“Mr. COTTON: That is what I understood, but I just wanted to make it clear.

“Mr. POULSEN: No.”

On the examination of Mr. Dixon the following ensued:

“Mr. COTTON: It would follow, as a matter of fact, that if the \$3.10 rate, or any lower rate than the barge rate was established, that it ought to be extended all the way up to Portland; would it not?”

“Mr. DIXON: Personally I have no objection to that; but I do not see that it would necessarily follow.

“Mr. COTTON: I am not considering your standpoint. I merely want your best opinion with reference to the industry in western Oregon.

“Mr. DIXON: I think, Mr. Cotton, that the arrangement in effect prior to April 18th was, from the standpoint of the lumber shippers, a fair arrangement.

“Commissioner PROUTY: How can you justify leaving Portland out of the San Francisco rate and taking you into the Eastern rate?”

“Mr. DIXON: The Portland mills have so much the ad-

vantage of us in almost every other branch of the business that I do not see how it is unfair to them to give us what might appear to be a slight advantage in one particular. In other words, they have a better grade of logs, they have a better market and more markets, they have a place to dispose of their refuse, and, what counts for more than anything else and is absolutely necessary to the successful conduct of the lumber business, they can get rid of their output, while we cannot, up to date."

Although we find the record replete with statements made during the course of the hearing by counsel for both parties, and certainly by one or more of the commissioners who were present at the hearing, which we think leave no doubt as to the nature and character of the power exerted, we do not pursue the subject further, since we are of opinion that the face of the opinion and the order so additionally serve to make manifest the situation as to render it unnecessary to do more than briefly advert to those subjects. While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole in the light of the condition of the record to which we have referred it clearly results that it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate which had prevailed for some time to a just and reasonable charge for the service rendered for the future. Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that the order

was an exertion of a power not possessed to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary. The obvious impression as to the nature and character of the power exerted given by the very face of the opinion of the Commission is shown by the syllabi to the official report of the opinion, which we copy in the margin.¹

Finally, the express exclusion of Portland from the benefit of the reduced rate and the reasons given for the exclusion indubitably establish the character of the power exerted so as to exclude the possibility of holding that it was merely the exercise of the right to correct an unjust and unreasonable rate. We say this because if the assumption be indulged in that the order was but the manifestation of the authority to correct an unreasonable rate, the traffic of Portland, in the absence of some lawful reason for excluding it, would be discriminated against by the order excluding Portland from the benefit of the reduced rate. We cannot, therefore, assume that the order was legal because it rests upon the power to correct an unreasonable and to substitute a reasonable rate, since to indulge in that assumption would at once beget the inevitable inference that the order was repugnant to the statute because of its dis-

¹ 1. Where a rate has been established and maintained for a considerable period for the purpose of developing a particular industry and with full knowledge that the industry could not be developed without it, and where, under the influence of such rate, large amounts of money have been invested in property the value of which must be seriously impaired by an advance of the rate, that fact is an important consideration in passing upon the reasonableness of such advance.

2. The Southern Pacific Company established a rate of \$3.10 per ton upon rough green fir lumber and lath from points in the Willamette Valley to San Francisco for the purpose of developing the lumber industry in that section, and maintained the rate in effect, with a brief interval, for six years; and on the strength of this rate that industry attained considerable proportions. In April, 1907, this rate was advanced to \$5 per ton: *Held*, That the advance was unreasonable and that the rate ought not for the future to exceed \$3.40 per ton.

criminatory character. And the reasons given for the exclusion of Portland from the benefit of the reduction which the order made likewise leave no room for the conclusion that the reduction was based merely upon the finding that the tariff rate which was reduced was, considering the service rendered, in and of itself unreasonable. The reasons for not applying the reduced rate to Portland were thus explained in the report of the Commission:

"The considerations which induce us to apply this lower rate to mills in the Willamette Valley do not obtain in case of Portland. These manufacturers have the benefit of the water rate, and are not, therefore, dependent at all upon the defendants for reaching the San Francisco market. The low rate was only applied to Portland for a comparatively short time, and has not been in force there for the last four years. It is of no special importance to the manufacturer at that point, and no injustice is done by withdrawing it. The distance from Portland is considerably greater than the average distance from Willamette Valley mills, and, on the whole, we think the defendants should be left to their option in meeting or declining to meet water rates at Portland. The claim of the intervenors is therefore denied."

Treating the order as having been based upon the assumed possession of the extraordinary power which it insisted was exercised in making the order, the force of the reasoning thus advanced to sustain the order cannot be successfully gainsaid. But upon the theory that the order was made merely as the result of the exercise of the statutory power to prevent the charging of an unreasonable and unjust rate, having regard to the service rendered, the inconsequence of the reasoning stated becomes at once patent. This must be the case because Portland had been deprived by the railroads of a just and reasonable rate for a longer time than the Willamette Valley points certainly afforded no ground for concluding that Portland was not

entitled to relief, and it is equally certain that the fact that there was competition by water from Portland can in no way justify the permitting the railroads to continue to charge against traffic from Portland a high and unreasonable rate. Indeed, if the order be assumed to have been made merely as the result of the power to correct an unjust and unreasonable rate, then the reasoning by which the order, in so far as it dealt with Portland was concerned, was sustained, comes to this, that the greater the wrong the lesser the right to redress, and the greater the reason for the low and competitive rate the stronger the reason for refusing to fix such a rate.

The considerations just stated dispose of the entire controversy except in one particular. It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of the Commission became effective, by operation of law the order of the Commission has spent its force, and therefore the question for decision is moot. The contention is disposed of by *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, this day decided, *post*, p. 498. In addition to the considerations expressed in that case it is to be observed that clearly the suggestion is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy.

The decree of the Circuit Court is reversed and the case remanded to that court, with directions to enter a decree declaring the order of the Interstate Commerce Commission to be void, and otherwise granting the relief prayed in the bill.

**END
OF
CASE**